

Customs Bulletin

Regulations, Rulings, Decisions, and Notices
concerning Customs and related matters



and Decisions of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 23

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., June 6, 1989.

The following are decisions of the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(C.S.D. 89-50)

Carriers: Interpretation of 19 U.S.C. 1466, in relation to certain equipment purchases, vessel modifications, and purchases of vessel supplies by a U.S.-flag vessel.

Date: December 12, 1988
File: VES-13-18-CO:R:P:C
109839 LLB

TO : Deputy Assistant Regional Commissioner Commercial
Operations Division
New Orleans, Louisiana 70130-2341

FROM : Chief, Carrier Rulings Branch.

SUBJECT: Vessel Repair Entry Number M05-0032972-3, July
26, 1988, F/V JESSICA B.

Reference is made to your memorandum of October 31, 1988, forwarding for our consideration the application for relief from vessel repair duties submitted by counsel on behalf of Saturn Legend Shipping Company. The application relates to the July 20, 1988, arrival of the vessel at Port Everglades, Florida, whereupon duties were assessed pursuant to section 466, Tariff Act of 1930, as amended (19 U.S.C. 1466), on the value of certain foreign shipyard operations performed on the vessel.

Section 1466 provides, in pertinent part, for payment of duty in the amount of 50 percent ad valorem on the cost of foreign repairs to vessels documented under the laws of the United States to engage in foreign or coastwise trade, or vessels intended to engage in such trade.

A leading case in the interpretation and application of section 1466 is *United States v. Admiral Oriental Line et al.*, 18 C.C.P.A. 137 (T.D. 44359 (1930)). That case distinguished between equipment and repairs on one hand and permanent additions to the hull and fittings on the other, the former being subject to duty under section 1466.

The Court in *Admiral Oriental*, *supra.*, cited with approval an opinion of the Attorney General (27 Op. Atty. Gen. 228). That opinion interpreted section 17 of the Act of June 26, 1884 (23 Stat. 57), which allowed drawback on vessels built in the U.S. for foreign account, wholly or in part of duty-paid materials. In defining equipment of a vessel, the Attorney General found that items which are not equipment are:

those appliances which are permanently attached to the vessel, and which would remain on board were the vessel to be laid up for a long period * * * [and] are material[s] used in the construction of the vessel * * *.

While the opinion of the Attorney General interpreted a provision of law other than section 1466 or a predecessor thereto, it is considered instructive and has long been cited in Customs Service rulings as defining permanent additions to the hull and fittings of a vessel.

For purposes of section 1466, dutiable equipment has been defined as:

* * * portable articles necessary or appropriate for the navigation, operation, or maintenance of a vessel, but not permanently incorporated in or permanently attached to its hull or propelling machinery, and not constituting consumable supplies. (T.D. 34150 (1940)).

It should be noted that the fact that a change or addition of equipment is made to conform with a new design scheme, or for the purpose of complying with the requirements of statute or code, is not a relevant consideration. Therefore, any change accomplished solely for these reasons, and which does not constitute a permanent addition to the hull and fittings of the vessel, would be dutiable under section 1466.

In this case, relief is sought regarding:

1. The first time installation of a permanently installed anchor windlass.
2. The first-time installation of a hold refrigeration system.
3. Certain "consumables" and services rendered in general support of the foreign shipyard work, such as shore power, watchman's charges, and the loading of stores and ballast.

We are of the opinion that the bulk of the relief sought is justified. The items referred to in the third item, above, are considered "classifiably free" items within the contemplation of the court case of *United States v. George Hall Coal Co.*, 134 F. 1003 (1905).

The actual installation of the anchor windlass and refrigeration system should be considered duty-free permanent additions to the hull and fittings under the *Admiral Oriental* case, *supra*. The pre-installation painting shown on the refrigeration system invoices is not, however, considered a necessary adjunct to the modification to follow, and should be considered dutiable.

In summary, the relief sought should, in our estimation, be granted, with the exception of that segregated portion of invoice cost code 1000 dedicated to preparing and painting of the process deck.

(C.S.D. 89-51)

Carriers: A petition for review under 19 U.S.C. 1466, concerning foreign shipyard operations.

Date: December 15, 1988
File: VES-13-13-CO:R:P:C
109840 LLB

TO : Deputy Assistant Regional Commissioner Commercial
Operations Division
New Orleans, Louisiana 70130-2341

FROM : Chief, Carrier Rulings Branch.

SUBJECT: Petition for Review, Vessel Repair Entry Number
C16-0005072-3, *M/V American Falcon*, V-22.

Reference is made to your memorandum of October 31, 1988, forwarding a petition for the review of our earlier decision regarding this entry, dated July 1, 1988 (case number 109575). The petitioner seeks review of our denial of relief on three items due to the non-segregation of invoices showing both dutiable and non-dutiable elements.

The items under consideration in this petition for review are:

Item	Invoice Page	Description
28	29	Sea values.
29	23	Rudder steering gear.
33	26	Anchor chains.

As previously mentioned, all of these items were denied relief due to non-segregation of repair from non-repair costs. Precedent for this result is found in C.I.E.'s 1325/58, and 565/55. The petitioner has submitted corrected invoices which segregate the portions of

items 28 and 33 found dutiable in our July 1, 1988, recommendation. Our July 1, 1988, advice invites the submission of more specific evidence, saying, " * * * in the absence of a more specific apportionment, the entire cost of item 28 is dutiable". C.I.E. 565/55 authorizes the submission of clarifying documentation, in finding as follows:

Accordingly, since it appears that the invoice covers both repairs and alterations, the cost of the former of which is dutiable and should not be remitted and the cost of the latter of which is not dutiable, the petitioner should submit an itemized invoice showing the cost of each. Otherwise it will be necessary to assess duty on the full sum of the invoice.

In light of our invitation to do so, the authorization for submission of such evidence provided in C.I.E. 565/55, and the revised invoices submitted by the petitioner in this case, the petition is granted in regard to items 28 and 33.

In regard to the remaining item (invoice item 29), the petitioner claims that the original invoice submitted with the initial application for relief was misinterpreted by Customs. Upon further review it appears that if all the work outlined in that invoice section had been performed it would have been insufficiently segregated to qualify for relief. We note, however, that the original invoice specifies that the repair aspects of the invoice had been cancelled and that only non-repair inspection elements were carried out. Since no repairs were performed in connection with item 29, the petition for relief on this item should be allowed.

In summary, after review of all evidence before us, we have determined that the petition for relief with regard to invoice items 28, 29, and 33, should be granted.

(C.S.D. 89-52)

Carriers: The use of a non-coastwise qualified vessel for sailing instruction and chartering under 46 U.S.C. App. 289.

Date: December 27, 1988

File: HQ 109850,

VES-3-02/19-CO-R:P:C 109850 LLB

Category: Carriers

COMMANDER FREDERICK A. BRAMAN
2822 Circle Ridge Drive
Orange Park, Florida 32065

Re: Use of pleasure vessel for sailing instruction and charter-party sailing.

DEAR COMMANDER BRAMAN:

Reference is made to your letter of October 31, 1988, requesting a ruling on whether certain proposed-alternative uses of your sailing vessel would require a change in its documentation to permit its use in the coastwise trade. For the purposes of this ruling, we presume that your vessel is qualified to be documented for the coastwise trade.

Facts:

The vessel under consideration is a 29-foot auxiliary sailboat which is currently documented for pleasure only. It is proposed to use the vessel for 90 percent pleasure cruising and 10 percent business purposes. The business uses would be divided between "crewed charters" and sailing instruction. This ruling from the Customs Service is requested in order that it may be determined whether the vessel must be documented for the coastwise trade as well as for pleasure.

Issue:

Whether proposed business uses of a pleasure vessel for sailing instruction, as well as "crewed charters" may require the vessel to be documented for the coastwise trade.

Law and Analysis:

Generally, the coastwise laws prohibit the transportation of merchandise or passengers between points in the United States embraced within the coastwise laws in any vessel other than a vessel built in, documented under the laws of, and owned by citizens of the United States. The passenger coastwise law, 46 U.S.C. App. 289, provides that:

No foreign vessel shall transport passengers between ports or places in the United States either directly or by way of a foreign port, under penalty of \$200 for each passenger so transported and landed.

Pursuant to 46 U.S.C. 12106 and 12110 and their predecessors (46 U.S.C. 65i and 65m and, before them, 46 U.S.C. 11) and consistent with 46 U.S.C. App. 883, the coastwise merchandise law, the Customs Service has consistently held that the prohibition in 46 U.S.C. App. 289 applies to all non-coastwise-qualified vessels. Non-coastwise-qualified vessels include any vessel other than a vessel built in, properly documented under the laws of, owned by citizens of the United States, and never sold foreign with certain exceptions (46 U.S.C. 12106(a)(2)(B) and 19 CFR 4.80(a)(2) and (3)).

In its interpretation of section 289, the Customs Service has ruled that the carriage of passengers entirely within territorial waters, even though the passengers disembark at their point of embarkation and the vessel touches no other coastwise point, is considered coastwise trade subject to the coastwise laws. Transportation of passengers from a point in the United States to the high seas or foreign

waters and back to the point of original embarkation, often called a "voyage to nowhere," is not considered coastwise trade. For purposes of the coastwise laws, a vessel "passenger" is defined as "* * * any person carried on a vessel who is not connected with the operation of such vessel, her navigation, ownership, or business." (Section 4.50(b), Customs Regulations.)

The Customs Service has held that a person being trained or receiving instruction in the handling or navigation of a vessel, and whose presence on board the vessel is necessarily required in order to receive such training or instruction, is not a "passenger" within the meaning of the coastwise laws. Accordingly, if the vessel is used for such training it would not be required to have a license to engage in the coastwise trade. (Ruling letter No. 109287)

We are uncertain exactly how you intend the phrase "crewed charters" to be interpreted. In any event, in the context of this case it can only mean one of two things. Either you intend to enter into a bareboat or demise charter agreement with various parties, by which you would surrender complete control of the vessel to the charter party, or you contemplate entering into a time or voyage charter arrangement in which you would maintain control over the navigation and operation of the vessel.

The Customs Service has consistently held that when a pleasure vessel is chartered under a *bona fide* bareboat charter, the charterer is treated as the owner of the yacht for the period of the charter and, because owners are not considered "passengers" for purposes of the coastwise laws, the charterer is not proscribed by the coastwise laws from using the yacht during the charter for *pleasure purposes only*, including the transportation of family and guests. A yacht chartered under a charter agreement other than a bareboat charter (e.g., a time or voyage charter) and used in coastwise transportation would be subject to penalties under the coastwise laws. A yacht chartered under a bareboat charter agreement could also be subject to these penalties if it were used for other than pleasure purposes or if the actions of the parties negated the terms of the bareboat charter agreement (e.g., if "guests" paid for or contributed to the expense of a trip, Ruling letter 108063).

Holding:

Given the foregoing facts, law, and analysis, we are of the opinion that your vessel may be used for *bona fide* sailing instruction without consequence under 46 U.S.C. App. 289. Further, there are no adverse section 289 implications arising from use of your vessel pursuant to a true bareboat charter, so long as the vessel is used for pleasure purposes only.

Given the above, you should now be in a position to determine whether you wish to seek coastwise documentation through your local office of the U.S. Coast Guard.

(C.S.D. 89-53)

Carriers: Documentary requirements for cargo moving by vessel between U.S. points in transit through the U.S., from foreign to U.S., and U.S. to foreign.

Date: December 28, 1988

File: VES-5-CO-R:P:C 109851 LLB

MR. J. R. CUCINOTTA
SEA-LAND SERVICE, INC.
5000 Columbia Center
701 Fifth Avenue
Seattle, Washington 98104-7099

DEAR MR. CUCINOTTA:

Reference is made to your letter of October 28, 1988, in which you present nine itineraries involving the movement of cargo by use of a coastwise-qualified vessel. Your inquiry concerns the documentary requirements for each of the proposed services and, indeed, you provide your views regarding the documentary requirements for each of the voyages. For ease of reference, we include an outline of your itineraries and perceived documentary requirements, as follows:

1. Canadian-origin cargo moved from Vancouver with discharge in Long Beach and/or Honolulu. (You suggest an Inward Foreign Manifest and Traveler Manifest).

2. U.S.-origin cargo from Long Beach to Honolulu, with the vessel proceeding to Canada following Honolulu discharge. (You question whether on Export Declaration (CF 7513) might be needed since the vessel will be in a coastwise/foreign movement).

3. U.S.-origin cargo to be discharged in Long Beach after the vessel has called in Canada. (Again, you question whether an Export Declaration (CF 7513) might be necessary).

4. U.S.-origin cargo, discharged in Canada. (You suggest an Outward Foreign Manifest and a CF 7525 Export Declaration).

5. Canada-origin cargo, discharged in Long Beach, then loaded aboard an Asia-bound vessel. (You suggest an Inward Foreign Manifest for the first vessel, and a CF 7512, Immediate Transportation, and Export Declaration (CF 7513), for the second vessel).

6. Asia-origin cargo discharged in Long Beach and then placed aboard a Canada-bound vessel for discharge. (You suggest an Inward Foreign Manifest for the first vessel and a CF 7512, Immediate Exportation, for the second vessel).

7. U.S.-origin cargo to be taken via rail to Canada and loaded aboard a vessel bound for Honolulu where the cargo would be discharged. (You suggest an Export Declaration, CF 7513).

8. U.S.-origin cargo taken to Canada for discharge, thence by rail to Tacoma, Washington. (You suggest a CF 7513 Export Declaration).

9. Asia-origin cargo, discharged in Long Beach, then taken via vessel to Canada and returned to Tacoma, Washington, via rail. (You suggest an Inward Foreign Manifest for the first vessel, followed by a CF 7512 Immediate Exportation and Immediate Transportation 7512 for the remainder of the transportation).

You conclude by asking whether a CF 3311 (Declaration for Free Entry of Returned American Products) would be necessary for movements of U.S.-origin cargos from U.S. port to U.S. port, when the vessel calls in Canada between U.S. stops.

A Shipper's Export Declaration (CF 7525), is required to be filed for merchandise shipments from the United States, Puerto Rico, and the U.S. Virgin Islands, destined for foreign countries, the Panama Canal Zone and U.S. Trust Territories, and foreign trade zones in foreign countries. Such declarations are also required for merchandise shipped either way between the U.S. and Puerto Rico, and from either of these locations to the U.S. Virgin Islands. The declaration is a Department of Commerce (Census Bureau) statistical vehicle, whose regulations provide that the document is to be filed:

* * * [at] the Customs port where the merchandise is loaded on the vessel or aircraft which is to carry the merchandise to a foreign country or to a non-foreign area of ultimate destination. (15 CFR 30.20 (c)).

A Shipper's Export Declaration for In-Transit Goods is also a Department of Commerce Form (CF 7513). This form is required for merchandise shipped by vessel which is in transit through the United States from one foreign country to another, including merchandise which is transshipped in a U.S. port.

Customs Form 3311, the Declaration for Free Entry of Returned American Products, is intended to accompany shipments of American goods which have been *exported* and then subsequently returned to the United States. The Customs Regulations provide, in section 101.1 (k) (19 CFR 101.1 (k)), that exportation:

* * * means a severance of goods from the mass of things belonging to this country with the intention of uniting them to the mass of things belonging to some foreign country.

With the foregoing as background, we can now proceed to address your specific inquiries. The numbered responses below correspond to the numbered inquiries previously set forth:

1. Your assessment as to required documentation is correct.
2. There is no CF 7513 requirement since the question does not contemplate merchandise in transit through the U.S., foreign to foreign.
3. Again, no CF 7513 is required.
4. Your assessment as to required documentation is correct.
5. Your assessment is correct. A CF 7513 is required in this case since it is contemplated to ship merchandise from Canada to Asia, through a port of the United States.

6. Your assessment is correct, except that a CF 7513 would also be required for Asian cargo moving through the U.S. and bound for Canada.

7. There is no CF 7513 required for this U.S. to U.S. movement, even though it is routed through Canada.

8. Again, there is no need for a CF 7513 for this U.S. to U.S. movement of merchandise. There may well be Canadian inbound documentary requirements of which we are not aware.

9. Your assessment as to documentary requirements is correct.

Finally, given the facts as presented to us, there would not be any need to furnish a CF 3311 in any of the proposed itineraries.

(C.S.D. 89-54)

Carriers: Coastwise transportation of dredge spoil in foreign-built barges.

Date: December 15, 1988

File: HQ 109902

VES-3/VES-10-02 CO:R:P:C 109902 PH

Category: Carriers

Mr. A. R. TORRICO
MILLER GENERAL & HEAVY CONSTRUCTION INC.
Post Office Box 55116
Seattle, Washington 98155

Re: Coastwise transportation in foreign-built barges of dredge spoil.

DEAR MR. TORRICO:

This in response to your letter of December 6, 1988, in which you request a ruling on the applicability of the coastwise laws to the transportation between points on the Snake River in the eastern part of the state of Washington of dredge spoil.

Facts:

You state that you are preparing to bid on a United States Corps of Engineers dredging project at the confluence of the Snake River in Clarkston county in the state of Washington. The project calls for the removal of sediments by dredging and the dumping of the dredged material about six miles down river. You state that you are considering the use of two Canadian registered hopper barges to transport the dredged material. The barges would be towed by a United States-flag tug. You ask whether the proposed use of the barges would be considered to be within the definition of "coastwise trade" and, if not, whether you would be required to change the documentation of the barges from Canadian to United States.

Issue:

Is the transportation of dredge spoil between points in the United States in a non-coastwise-qualified vessel, such as a Canadian registered hopper barge, prohibited by 46 U.S.C. App. 883, the coastwise merchandise statute?

Law and Analysis:

Section 27 of the Act of June 5, 1920, as amended (41 Stat. 999; 46 U.S.C. App. 883, often called the Jones Act), provides, in pertinent part, that:

No merchandise shall be transported by water, or by land and water, on penalty of forfeiture of the merchandise (or a monetary amount up to the value thereof as determined by the Secretary of the Treasury, or the actual cost of the transportation, whichever is greater, to be recovered from any consignor, seller, owner, importer, consignee, agent, or other person or persons so transporting or causing said merchandise to be transported), between points in the United States * * * embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States * * *.

Section 4370 of the Revised Statutes, as amended (R.S. 4370; 46 U.S.C. App. 316(a), the coastwise towing statute), prohibits the towing of any vessel, other than a vessel in distress, by a vessel not documented under the United States flag to engage in the coastwise or Great Lakes trade between ports or places in the United States embraced within the coastwise laws, either directly or by the way of a foreign port or place, or for any part of such towing, or such towing between points in a harbor of the United States.

Each of the above laws was recently amended by the Act of June 7, 1988 (Public Law 100-329). Section 883 was amended so that the term "merchandise" includes valueless material and so that it applies to the transportation of "valueless material or any dredged material regardless of whether it has commercial value, from a point or place in the United States or a point or place on the high seas within the Exclusive Economic Zone as defined in the Presidential Proclamation of March 10, 1983 [EEZ], to another point or place in the United States or a point or place on the high seas within that [EEZ]." Section 883 was also amended so that the penalty for violation of the statute now is forfeiture of the merchandise transported or a monetary amount up to the value thereof, "or the actual cost of the transportation, whichever is greater." Section 316(a) was amended so that it applies to the towing of "any vessel transporting valueless material or any dredged material, regardless of whether it has commercial value, from a point or place in the United States or a point or place on the high seas within the [EEZ]

to another point or place in the United States or a point or place on the high seas within that [EEZ]."

Accordingly, on the basis of the recent amendment to 46 U.S.C. App. 883 effected by Public Law 100-329, the transportation of dredge spoil between points or places in the United States in a non-coastwise-qualified vessel is prohibited. The proposed transportation of dredge spoil between points in the United States in the Canadian registered barges would be prohibited by section 883.

We note that even if the barges under consideration were built in the United States, they would be prohibited from being redocumented for, and used in, the coastwise trade because they have been placed under foreign (Canadian) registry (see the Act of July 2, 1935 (49 Stat. 442), often called the "First Proviso to the Jones Act"). We also note that under the coastwise towing statute (46 U.S.C. App. 316(a)), the vessels which tow the barges which transport the dredge spoil must be coastwise-qualified. Finally, as you are probably already aware, any dredge used in the dredging project would be required to be built in the United States, pursuant to section 1 of the Act of May 28, 1906 (34 Stat. 204; 46 U.S.C. App. 292).

Holding:

The transportation of dredge spoil between points in the United States in a non-coastwise-qualified vessel, such as a Canadian registered hopper barge, is prohibited by 46 U.S.C. App. 883.

(C.S.D. 89-55)

Entry/Liquidation: The Customs Service can require documentation, including a foreign commercial invoice, to verify that merchandise qualifies for duty-free GSP treatment.

Date: December 22, 1988

File: PRO-3-CO:R:C:E

220976 GG

Category: Entry/liquidation

DEPUTY ASSISTANT REGIONAL COMMISSIONER
CLASSIFICATION AND VALUE
SOUTHEAST REGION

Re: Application for Further Review of Protest No. 5201-4-000444, protesting your decision in the liquidations on May 18, 1984, of entry no.'s 5201-84-275015 and 5201-84-275016, dated January 13, 1984, covering a shipment of brass ceiling lamps from Hong Kong.

DEAR SIR:

This is in response to your memorandum dated July 23, 1985, which was routed through New York and in which you requested further review by Headquarters of the protest cited above.

Facts:

Wing Tat Electric Company produced brass ceiling fans in Hong Kong, and subsequently sold them to Moss Manufacturing, Inc., a U.S. firm. The Home Depot, Inc. of Atlanta, Georgia then purchased the fans from Moss Manufacturing and arrangements were made for Wing Tat Electric to export them directly to the Georgia company. The Home Depot was listed on the consumption entry as the importer of record; it claimed duty-free status under the Generalized System of Preferences (GSP), and entered the goods under item 645.00 of the Tariff Schedules of the United States. The prefix "A" was attached to the item number to indicate a GSP claim was being made, and a GSP Certificate of Origin Form A was filed. The Customs Service denied free entry and assessed duties on the basis that the actual shipment was not the same as that listed on the Form A. This was substantiated by examining the bill of lading.

Issue:

1. Whether the Customs Service can require production of the original foreign commercial invoice when the merchandise was shipped to the U.S. pursuant to a domestic resale agreement and the Customs Service was provided with the resale invoice?; and
2. Whether the documentation supplied was sufficient to permit duty-free GSP entry?

Law and Analysis:

U.S. Customs is required by law to determine the value of imported merchandise. Generally, the customs value of all merchandise is the transaction value, which is the price actually paid or payable for merchandise when sold for exportation to the United States, plus certain additional amounts. See 19 U.S.C. 1401(a) and § 152.103, Customs Regulations. Pursuant to 19 U.S.C. 1481 and § 141.86 of the Customs Regulations, commercial invoices must be submitted to assist Customs with the classification and valuation process. In this particular case, the protester questions the Customs Service's demand that it be provided with the original foreign invoice between Wing Tat Electric and Moss Manufacturing. The Home Depot maintains that such a submission would violate accepted business practices as it would disclose the profit margin of the middleman. Prior rulings have held that the invoice submitted with the entry summary must reflect all details of the transaction that brought the merchandise to the United States. For example, a foreign commercial invoice normally would not be required when foreign merchandise was bought by a U.S. company and resold to another domestic firm before exportation to this country. A domestic

resale invoice would suffice as the sale between the two domestic businesses led to the importation of the goods. On the other hand, if a foreign manufacturer sold and shipped merchandise to a U.S. buyer who then resold the goods to another U.S. concern, a foreign commercial invoice would be required.

The documentation provided reveals that Wing Tat Electric packed the fans for Moss Manufacturing on November 28, 1983, but filled out a bill of lading made to the order of The Home Depot the following day. This evidence that a sale had already occurred between Moss Manufacturing and The Home Depot was weakened by the domestic resale invoice submitted with the entry, which indicated that the sale took place after the merchandise had left Hong Kong. Under these circumstances it is possible that U.S. Customs could rightfully have demanded the foreign commercial invoice. However, for reasons which will be explained below, the timing of the resale was not a crucial issue in this case.

Regardless of when the merchandise was sold for exportation, other factors mandate that the Customs Service be provided with the Wing Tat Electric-Moss Manufacturing foreign commercial invoice. Here, the importer is claiming duty-free status under the GSP and must demonstrate that the articles are eligible for such treatment. As stated in 19 U.S.C. 2461 and §§ 10.171-178 of the Customs Regulations, GSP merchandise must be produced in a beneficiary developing country from which it is directly shipped. This requirement can be satisfied when the goods, *inter alia*, are substantially transformed into new and different articles of commerce in the beneficiary developing country, and the cost or value of materials produced there and/or the direct costs of processing performed there represent at least 35% of the appraised value of the goods. The importer must submit a GSP Form A as evidence that the country of origin criteria listed above have been met, and the district director has the authority to request verification that its contents are correct. See § 10.173, Customs Regulations. The district director in this particular case stated that the Customs Service had to see the foreign commercial invoice between Wing Tat Electric and Moss Manufacturing to confirm the accuracy of the information listed on the Form A. While in ordinary circumstances such a request might be unwarranted based on the rulings outlined above, it is justified where the district director is acting within his power to investigate a claim for duty-free GSP treatment. Thus, the request in this instance was proper.

The Home Depot's protest should be denied because this company failed to prove that the imported ceiling fans originated in a GSP country. § 10.173(a) of the Customs Regulations and C.S.D. 81-14 specify that a properly completed Form A is a condition precedent to the granting of duty-free GSP status. The Form A submitted by the Home Depot referred to merchandise with different lot numbers from those of the goods actually shipped, and for this reason was

not a valid certificate of origin. It was impossible for the Customs Service to verify that the shipped articles qualified for GSP treatment. Although the district director under § 10.173 of the Customs Regulations may waive production of the certificate of origin when he is otherwise satisfied that the merchandise qualifies for duty-free GSP entry, here he decided not to do so. No evidence has been offered to suggest that his reasons were invalid or an abuse of discretion. As a claim for duty-free entry shall be allowed only if the district director is of the opinion that all the GSP provisions have been met, for the reasons stated above you are directed to deny the protest.

Holding:

1. The Customs Service can require documentation, including a foreign commercial invoice, to verify that merchandise qualifies for duty-free GSP treatment; and

2. The documentation submitted by an importer claiming free entry under the GSP must be accurate and extensive enough to satisfy the district director that all GSP requirements have been met. Where, as here, the certificate of origin Form A contained errors or inconsistencies which raised doubts about the merchandise's origin, free entry under the GSP was properly denied. For these reasons, you are directed to deny the protest in full.

(C.S.D. 89-56)

Marking: Country of origin marking of surgical towels.

Date: December 21, 1988

File: HQ 731709

MAR-2-03 CO:R:C:V 731709 SO

Category: Marking

MR. CHUCK MASEK
DiMED, INTERNATIONAL
3803 Corporex Park Drive
Suite 750
Tampa, Florida 33619

Re: Marking of surgical towels.

DEAR MR. MASEK:

In your letter of August 19, 1988, you requested a ruling on the country of origin marking requirements applicable to certain surgical towels.

Facts:

Your firm is in the business of producing and selling sterile surgical towels. The towels are manufactured in China and arrive in the U.S. in an unwashed state with small sewn-in labeling tags, presumably marked to indicate the country of origin, attached to each towel. The imported towels are washed, folded, placed in individual packages and sterilized. The sterile towels are shipped to hospitals and outpatient surgery centers in unopened cases. You are concerned that the labeling tags could become detached from the towel during surgery and fall into an open wound. This could create a life threatening situation for the patient and an increased liability to your firm. You submitted a sample of the package and box labels your firm uses which state clearly, "Towels made in China. Processed and sterilized in USA." You requested a ruling on whether the package and box labels meet the country of origin marking requirements of the law, thus eliminating the need for labeling tags on the towels themselves.

Issue:

Would country of origin marking as indicated above on the box and on individual packages meet the country of origin marking requirements of the law and regulations, thus eliminating the need for sewn-in labels?

Law and Analysis:

Unless excepted, section 304(a), Tariff Act of 1930, as amended (19 U.S.C. 1304(a)), provides, in general, that every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly and permanently as the nature of the article will permit, in such a manner as to indicate to an ultimate purchaser in the U.S. the English name of the country of origin of the article. Section 134.1(d), Customs Regulations (19 CFR 134.1(d)); describes the "ultimate purchaser" as "generally the last person in the U.S. who will receive the article in the form in which it is imported."

Section 304(a)(3)(D), Tariff Act of 1930, as amended (19 U.S.C. 1304(a)(3)(D)), provides an exception from the marking requirement if, "the marking of a container of such an article will reasonably indicate the origin of the article." Section 134.32(d), Customs Regulations (19 CFR 134.32(d)), provides an exception to marking requirements for articles for which the marking of the containers will reasonably indicate the origin of the articles. In order to qualify for this exception, two criteria must be met: (1) the item must reach the ultimate purchaser in a properly marked container, and (2) the container must reach the ultimate purchaser unopened.

Section 134.41(a), Customs Regulations (19 CFR 134.41(a)), provides, in part, that as a general rule, marking requirements are best met by marking worked into the article at the time of manufacture. However, section 134.44, Customs Regulations (19 CFR 134.44), pro-

vides that except for articles which are the subject of a ruling by the Commissioner of Customs or those articles classifiable in an item number specified in section 134.43, Customs Regulations (19 CFR 134.43) (not applicable here), any marking that is sufficiently permanent so that it will remain on the article until it reaches the ultimate purchaser unless it is deliberately removed is acceptable.

We find that the marking you suggested for the cases of sterile towels and the packages containing each individual towel is sufficiently permanent to reach the ultimate purchasers (the hospitals and outpatient surgery centers). Accordingly, the individual towels would not have to be marked by means of small sewn-in labels. They may be excepted from individual marking pursuant to 19 U.S.C. 1304(a)(3)(D) and 19 CFR 134.32(d) so long as the cases and the individual packages reach the ultimate purchasers unopened and are legibly and conspicuously marked to indicate the country of origin. You should be prepared to furnish a statement or affidavit to this effect for each entry for which this exception is requested.

Holding:

An exemption from marking each individual towel with the country of origin by means of a sewn-in label is granted pursuant to 19 U.S.C. 1304(a)(3)(D) and 19 CFR 134.32(d), if the conditions under which the exemption is granted are met as outlined in this decision. Under the facts in this case, we are of the opinion that the surgical towels, packaged, boxed and labeled as described above, would be marked by a sufficiently permanent means to meet the country of origin requirements of the law and regulations.

(C.S.D. 89-57)

Marking: Country of origin marking of sterling silver stamped earrings.

Date: December 27, 1988

File: HQ 731760

MAR 2-05 CO:R:C:V 731760 PH

Category: Marking

MR. STEVE SAILOFSKY
CHATEAU D'ARGENT
3441 Ashby-St. Laurent
Quebec, Canada 44R 2K3

Re: Country of origin marking requirements for sterling silver stamped earrings.

DEAR MR. SAILOFSKY:

This is in response to your letter of August 15, 1988, concerning the country of origin marking requirements for sterling silver stamped earrings made in Canada.

Facts:

The submitted sample consists of four earrings, each approximately 1/4" to 1/2" in diameter and two of which are of cut-out design. You have inquired whether stamping the earrings with the abbreviation "CAN" or "CDN" would satisfy country of origin marking requirements. You claim that the earrings are too small to allow for more than a three digit mark. In addition, you claim that carding the earrings, to enable "made in Canada" to be legible, would be economically prohibitive and that using hang tags would be impractical.

Issue:

Does stamping individual earrings with "CAN" or "CDN" satisfy the requirements of 19 U.S.C. 1304?

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Part 134, Customs Regulations (19 CFR Part 134), sets forth regulations implementing the country of origin marking requirements and exceptions of 19 U.S.C. 1304. Section 134.41, Customs Regulations (19 CFR 134.41), provides that the marking of an imported product must be conspicuous enough so that the ultimate purchaser will be able to find the marking easily and read it without strain. Notice of acceptable markings other than the English name of the country of origin shall be published in the "Federal Register" and the "Customs Bulletin." Section 134.45(b), Customs Regulations (19 CFR 134.45(b)), states that abbreviations which unmistakably indicate the name of a country are acceptable.

Customs has ruled that neither "CDA" (724336 dated January 16, 1984) nor "CAN" (722566 dated September 14, 1983) are acceptable abbreviations for Canada for country of origin marking purposes under 19 U.S.C. 1304. Neither abbreviation unmistakably indicates Canada as the country of origin to the ultimate purchaser. Likewise, it is our position that "CDN" is not an acceptable marking under 19 U.S.C. 1304. Accordingly, the mere stamp of "CAN" or "CDN" on the individual earrings is not sufficient. Furthermore, we note that due to the size of the earrings, any marking on the individual pieces would not be found easily or read without strain by the ultimate purchaser.

With regard to the alternative methods of country of origin marking addressed in your letter, it is the opinion of this office that you have not provided sufficient explanation as to why these methods are unsuitable. Although you assert that carding the earrings is economically prohibitive, you have not provided any cost estimates to support this. You further state that hang tagging each pair of earrings is not sufficient because the tags fall off. However, you have not demonstrated how the tags would fall off, especially in light of the fact that each could be secured in place with the earring back. We note that each of these methods is commonly used in the United States and would be acceptable under Customs marking requirements. In addition, we note an alternative acceptable method of placing each pair of earrings in a plastic bag and using a hang tag.

Holding:

Based on the above considerations and after examination of the samples submitted, we find that the abbreviations "CAN" and "CDN" are not acceptable because they do not unmistakably designate the country of origin to the ultimate purchaser. As the proposed stamped abbreviations do not comply with 19 CFR 134.45(b) we suggest that you mark the earrings by one of the alternative acceptable methods that would allow for use of the whole word "Canada."

(C.S.D. 89-58)

Marking: Country of origin marking of pipe fittings (center ring).

Date: December 22, 1988

File: HQ 731966

MAR-2-05 CO:R:C:V 731966 jd

Category: Marking

STEVEN W. BAKER

BELLSEY AND BAKER

100 California Street

Suite 670

San Francisco, California 94111

Re: Country of origin marking requirements applicable to pipe fittings.

DEAR MR. BAKER:

This is in reply to your letters of November 30, 1988 and May 27, 1988, concerning the country of origin marking requirements applicable to a component of a pipe coupling known as a center ring.

Facts:

According to your submission, your client imports parts and components of iron and steel to be processed into finished pipe fittings in the U.S. One component, known as a center ring, is designed to join sections of cast iron or steel pipe with outside diameters of from 4 to 13.92 inches to pipe sections of the same nominal size but with outside diameters of from 4 to 14.40 inches. The sample center ring we examined is a ductile iron casting resembling a pipe section, 6 inches in outside diameter and 5½ inches long.

In ruling 082236, November 22, 1988, you were advised that center rings, and other components known as flanged coupling adapter bodies, are substantially complete fittings and classifiable under the provision for pipe and tube fittings of iron or steel, ductile fittings, in item 610.82, Tariff Schedules of the United States.

As you are aware, that tariff classification subjects the center rings to 19 U.S.C. 1304(c)(1). That section requires, in pertinent part, pipe fittings of steel or cast and malleable iron to be marked with the English name of the country of origin by means of die stamping, cast-in-mold lettering, etching or engraving.

You believe that the center rings should be allowed the alternate marking methods mentioned in 19 U.S.C. 1304(c)(2) since it is technically impossible or commercially infeasible to mark by one of the more permanent methods. In support of this request you state:

Unlike any other part, center rings have no marking as it is impossible to imprint a permanent marking on the casting because of the way it is cast. A center ring is thickest at the mid-point; thereafter it has a slight taper towards each end with a severe taper at each end which accommodates a gasket. With such a design a center ring must necessarily be cast on end with the parting line being in the middle of the casting. Thus it is impossible to put any markings on the side of the casting for such markings would either be destroyed when the pattern was removed from the cavity or would completely prohibit the pattern from being removed from the cavity. The only possible area to put a permanent marking is on the ends; a practice which is also necessarily impossible for it would negate the integrity of the seal between the gasket and the center ring and thereby make the part useless.

Issue:

Can center rings, i.e., pipe fittings of cast iron or steel, be marked for country of origin marking purposes by means other than die stamping, cast-in-mold lettering, etching or engraving?

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), requires that, unless excepted, every article of foreign origin (or its container) imported into the United States shall be marked in a conspicuous place as legibly, indelibly and permanently as the na-

ture of the article (or container) will permit, in such a manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article.

Section 207 of the Trade and Tariff Act of 1984, amended 19 U.S.C. 1304 by requiring that all imported pipe and pipe fittings of iron or steel be permanently marked to indicate their country of origin by means of die stamping, cast-in-mold lettering, etching or engraving. Subparagraph (c)(2) of 19 U.S.C. 1304 provides however that if it would be technically or commercially infeasible to use one of the four listed methods of marking, "the article may be marked by an equally permanent method of marking such as paint stenciling or, in the case of small diameter pipe, tube, and fittings, by tagging the containers or bundles."

It is the opinion of this office that you have presented a sufficient case of technical or commercial infeasibility of marking center rings by either die stamping, cast-in-mold lettering, etching or engraving. Your specific description of the problems with marking during the molding process eliminates cast-in mold lettering as a possible marking method. As far as other methods are concerned you state that marking on the end of the ring would destroy the integrity of the seal and make it commercially infeasible, and from experience we know that marking the side of fittings can weaken wall strength, also a commercial infeasibility.

Accordingly, your request to mark the center rings by paint stenciling is granted. However, your request to tag bundles or containers is denied. Subparagraph (c)(2) of 19 U.S.C. 1304 states that alternate marking methods should be by "an equally permanent method" and although neither paint stenciling nor tagging is as equally permanent as the four preferred methods of marking listed, paint stenciling is clearly more nearly equally permanent. Further, the statute suggests tagging as an alternative in the case of small diameter pipe, tube or fittings. The subject center rings do not qualify as small diameter when for purposes of applying the statute small is defined as incapable of being paint stenciled. In fact, your submission indicates that sizes are stenciled on the center ring in a completed fitting.

Holding:

Center rings, as described above, may be marked as to country of origin by means of paint stenciling. However, for the reasons set forth above, tagging of bundles or containers of center rings is not an acceptable method of marking.

U.S. Customs Service

General Notice

COUNTRY OF ORIGIN MARKING REQUIREMENT ON FRUIT JUICE CONTAINERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of postponement of effective date.

SUMMARY: This document advises interested parties that the scheduled June 7, 1989, implementation date for requiring that labels on frozen concentrated and reconstituted fruit juices which contain imported concentrate be marked to show the foreign country of origin of the concentrate, is postponed.

FOR FURTHER INFORMATION CONTACT: John Doyle, Office of Regulations and Rulings, (202) 566-5765.

SUPPLEMENTARY INFORMATION: Customs published a notice in the Federal Register on June 7, 1988 (53 FR 20836), announcing June 7, 1989, as the effective date for requiring that labels on frozen concentrated and reconstituted fruit juice products which contain imported concentrate be labeled to show the foreign country of origin of the concentrates. Such a rule is already in place in regard to imported orange juice concentrate and was to be extended to all other imported fruit juice concentrates. A method of compliance available to orange juice processors known as major supplier marking was also made available to processors of other juices.

Customs published another notice that same day (53 FR 20869), announcing that consideration was being given to discontinuing major supplier marking as an acceptable compliance method and requiring that all sources marking be the acceptable method for complying with the marking law as applied to imported fruit juice concentrate.

In the intervening months since those notices were published, Customs has considered the many comments received, and sought a resolution to this marking problem that balances the needs of all the parties concerned.

DETERMINATION: The June 7, 1989, implementation date for requiring that labels on frozen concentrated and reconstituted fruit juices which contain imported concentrate be marked to show the

foreign country of origin of the concentrate, is postponed. Customs will publish a final rule concerning the country of origin marking of imported fruit juice concentrate, applicable to the entire juice industry, on or before August 7, 1989.

Dated: June 1, 1989.

WILLIAM VON RAAB,
Commissioner of Customs.

[Published in the Federal Register, June 6, 1989 (54 FR 24168)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 89-1078)

BELFONT SALES CORP., PLAINTIFF-APPELLEE v. UNITED STATES, DEFENDANT-
APPELLANT

Steven R. Sosnov, Sosnov & Associates, of Norristown, Pennsylvania, argued for plaintiff-appellant.

James A. Curley, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellant. With him on the brief were John R. Bolton, Assistant Attorney General, David M. Cohen, Director and Joseph I. Liebman, Attorney in Charge, International Trade Field Office. Also on the brief was Edward N. Maurer, U.S. Customs Service, of counsel.

Appealed from: U.S. Court of International Trade.

Judge AQUILINO.

(Decided May 23, 1989)

Before MARKEY, *Chief Judge*, NEWMAN and ARCHER, *Circuit Judges*.

NEWMAN, *Circuit Judge*.

The United States appeals the decision of the United States Court of International Trade holding that battery-operated quartz analog watches are classified, and dutiable as an entirety, under item 688.45 of the Tariff Schedules of the United States. *Belfont Sales Corp. v. United States*, 666 F. Supp. 1568 (Ct. Int'l Trade 1987), *reh'g denied*, 698 F. Supp. 916 (Ct. Int'l Trade 1988). The decision of the Court of International Trade is affirmed, for the reasons stated in that court's published opinion.

AFFIRMED

(Appeal No. 89-1080)

RSI (INDIA) PVT., LTD., SOUTH BAY FOUNDRY, CRESWELL TRADING CO. AND CITY PIPE CO., PLAINTIFFS-APPELLANTS, KAJARIA CASTINGS PVT., LTD., KEJRIWAL IRON & STEEL WORKS, SERAMPORTE INDUSTRIES PVT., LTD., UMA IRON & STEEL CO., COMMEX CORP., GOVIND STEEL CO., LTD. AND EAST COAST MANUFACTURING, PLAINTIFFS V. UNITED STATES, MALCOLM BALDRIGE, SECRETARY OF COMMERCE, GILBERT B. KAPLAN, DEPUTY ASSISTANT SECRETARY OF COMMERCE FOR IMPORT ADMINISTRATION, AND WILLIAM VON RAAB, COMMISSIONER OF CUSTOMS, DEFENDANTS-APPELLEES, PINKERTON FOUNDRY INC., ALHAMBRA FOUNDRY CO., ALLEGHENY FOUNDRY CO., CAMPBELL FOUNDRY CO., DEETER FOUNDRY INC., EAST JORDAN IRON WORKS, INC., LEBARON FOUNDRY INC., MUNICIPAL CASTINGS INC., NEENAH FOUNDRY CO., U.S. FOUNDRY & MFG. CORP., AND VULCAN FOUNDRY INC., DEFENDANTS

Ronald M. Wisla, of Brownstein Zeidman and Schomer, Washington, D.C., argued for plaintiffs-appellants. With him on the brief were Irwin P. Altschuler and Claudia G. Pasche, of Brownstein Zeidman and Schomer, Washington, D.C.

Elizabeth C. Seastrum of the Civil Division, Department of Justice, Washington, D.C., argued for defendants-appellees. With her on the brief were John R. Bolton, Assistant Attorney General, and David M. Cohen, Director. Of counsel were Michael A. Levitt, Acting General Counsel, Stephen J. Powell, Chief Counsel, and Mark J. Sadoff, Attorney-Advisor, United States Department of Commerce. Paul C. Rosenthal, of Collier, Shannon, Rill & Scott, Washington, D.C., argued for defendants Pinkerton Foundry Inc., et al. With him on the brief was Carol A. Mitchell, of Collier, Shannon, Rill & Scott, Washington, D.C.

Appealed from: U.S. Court of International Trade.

Judge DiCARLO.

(Decided June 1, 1989)

Before MARKEY, *Chief Judge*, NICHOLS, *Senior Circuit Judge*, and NEWMAN, *Circuit Judge*.

NICHOLS, *Senior Circuit Judge*.

This appeal presents for our review a series of decisions by the Court of International Trade (687 F. Supp. 605 (1988), *reh'g denied*, 688 F. Supp. 646 (1988)) which, in the end, affirm the determination of the Department of Commerce, International Trade Administration (ITA or Agency), 45 Fed. Reg. 68, 650 (1980), and dismiss the proceeding. The case involved the 1984 annual review establishing that the amount of bounty or grant paid by the Government of India in that year upon export of iron-metal construction castings, e.g., manhole covers, was 7.31 percent *ad val.* Appellants are RSI and three companies that import the products here. RSI paid an export subsidy but contended it was not countervailable because all it did was, in effect, to provide by the subsidy a component of the article, pig iron, at the world price instead of the artificially maintained higher price within India. The Agency, for reasons whose va-

lidity comprises the chief issue for our decision, held the subsidy was countervailable in its entirety with no offset. The Court of International Trade decided some aspects of the case not here on appeal, rejected a government motion to dismiss the appellant importers as not having been parties before the ITA, and affirmed the refusal of the ITA to calculate the world price of the pig iron actually used and to allow the subsidy to offset the difference between the world price and the price the producers actually had to pay within India. We affirm.

BACKGROUND

The problem arose from a 19 U.S.C. § 1671 and ff countervailing duty order on manhole covers and frames, cleanout covers and frames, and catch basins from India classifiable under TSUS items 657.0950 and 657.0990. The annual review under section 1675(a)(1) for 1984 revealed a subsidy ostensibly but not really meant as an offset to the fact that an Indian producer had to get the pig iron used in production at the artificially maintained Indian price, not the world price, understood to be much lower. However, in calculating the subsidy the Indian Government used a world price based on an earlier single purchase by the Indian Government which the International Trade Commission would not accept as a world price. It was of the opinion that pig iron did not, like many other commodities, have an established, ascertainable world price. Moreover, the subsidy formula was based on a standard consumption factor of 70 percent of the exported castings by weight, whereas the actual consumption "among the exporters we verified" was significantly lower than the standard factor.

Because of these difficulties, we cannot determine whether the IPRS [the subsidy] is non-distortive of market forces, a functional equivalent of duty drawback or consistent with item (d) of the Illustrative List.

51 Fed. Reg. 45,789. The list in question is a list prepared under the General Agreement on Tariffs and Trade (GATT) which, by 19 U.S.C. §§ 2502(1) and 2503(c)5, the Congress incorporated into United States law. In effect it makes the provision by governments of goods or services to producers for export countervailable only to the extent the terms or conditions are more favorable than those that would be available on world markets to its exporters. The appellants contended to the trial court that by this provision the ITA was required to determine a world price or estimate one for pig iron and also to ascertain a proper figure for the pig iron content of the exported articles. They did not attempt to defend the entire subsidy as proper, but thought that part of it was, and by law the ITA could not base its countervailing duty figures on the proper as well as the improper parts. In their view, the countervailing duty law was remedial, not punitive. The law, they say, requires a duty "equal to

the net amount of such bounty or grant," 19 U.S.C. § 1303(a); see also 19 U.S.C. § 1671(a). They quote legislative history reflecting that the "value" of the subsidy must be determined and must adequately represent or estimate the benefit actually bestowed.

In course of the proceeding in the trial court, the government first made a contention it repeats here. The statute, it says, 19 U.S.C. § 1516a(a)(2)(A), allows a Court of International Trade challenge to a countervailing duty determination only to one who is "an interested party who is a party to the proceeding in connection with which the matter arises." See also 28 U.S.C. § 2631(c). It says the appellants, South Bay Foundry, et al., were not such parties in the ITA because they did not appear within 30 days of the publication of the Department's preliminary results of administrative review, nor did they appear with the permission of the Secretary after a "showing of good cause" to his satisfaction. 19 C.F.R. § 355.7(i)(4). Their participation certainly came late, and the Secretary or his designates never formally passed upon any showing of "good cause." However, appellants filed a brief which became and is part of the present administrative record. The trial court found the "Secretary" considered it as he is presumed to consider everything properly before him.

OPINION

I

Taking first the objection to the standing here of South Bay Foundry, et al., the importers, they are unquestionably interested parties and no one suggests otherwise. We are not referred to any statute such as are sometimes encountered, which makes untimely pursuit of a remedy jurisdictional with no provision for waiver or extension. The "Secretary" might have exacted a more formal application to become a party, but we do not think South Bay Foundry, et al. should suffer for the Secretary's apparent laxness. We think by silence he implicitly found good cause for letting the brief remain in his record. We agree with the Court of International Trade, *RSI (India) Pvt., Ltd. v. United States*, 678 F. Supp. 304, 307 (1988) that

[t]he participation requirement is obviously intended only to bar action [in court] by someone who did not take the opportunity to further its interests at the administrative level.

In other words, the statute is meant to protect the primary jurisdiction of the ITA, not to set a trap for unwary importers. Here the ITA knew of the concern of the importers and was made aware of what they had to say. That was the purpose of requiring them to be parties before the ITA if they were going to litigate afterwards.

II

The really significant legal question here is whether, as RSI and the importers argue, the provisions cited above require the ITA to analyze the subsidy, separate the rupees that might legitimately have been awarded to offset the excess paid for pig iron in India over the world price, from other and, from the point of view of the GATT, illegitimate subsidy, and calculate a duty to countervail the latter only. The ITA objects that such a calculation would be an imaginary construction. The law does not, it says, require it to postulate a calculation RSI made no attempt to construct in the real world, one whose existence was ostensible only.

We are fortunate in having guidance in a past decision of this court: *Industrial Fasteners Goup, American Importers Ass'n v. United States*, 710 F.2d 1576, 1 Fed. Cir. (T) 81 (1983) (Davis, J.). There are differences between that case and this, but we do not think they are such as would justify a different result. It involved industrial fasteners from India, subsidized at 17½ percent ostensibly to offset the impact of internal indirect taxes. It was established by the ITA that the impact of actual indirect taxes was under 17½ percent, and that sum was awarded on the basis of "other criteria." This court held that the subsidy should have been calculated on the basis of the actual tax experience of the product under investigation. Although it is clear from the opinion that indirect taxes were paid in some amount, and properly calculated beforehand need not have been countervailed, a figure selected for other reasons could not have been retroactively justified by the incurrence of indirect taxes in any amount.

There are three differences between that case and this, differences we deem immaterial. First, that case dealt with a subsidy to offset domestic indirect taxes, this deals with an asserted offset of a high cost of a necessary raw material in a protected home market. Second, there was an ITA publication relied on there as supporting the result: no counterpart publication is relied on here; however, the court there refers to no GATT provision as having a bearing, such as we have here. Third, the appellants there did not offer to accept a reduced countervailing duty based on the actual tax experience, and no such possibility is reflected in the court's opinion. We think none of these points argue persuasively for a different result. The significant point is, we think, that the ITA is under no legal duty to construct an imaginary noncountervailable subsidy when the real subsidy is not shown to have been constructed in any such way and can not be shown to be nondistortive of market forces. We think on principle the ITA is right and we would affirm it on this point even if we had no authority to follow, binding on us. We would be most reluctant to substitute our uninformed judgment for the ITA's expertise with respect to the economic effect of an undisputed "bounty or grant," and how much duty is necessary to countervail it. We accept ITA's view that an imaginary subsidy construc-

tion is no help in determining the real world economic impact of an illegitimate actual subsidy. Its decision is supported by substantial evidence and not arbitrary and capricious or contrary to law: that is all we need to hold in order to affirm.

AFFIRMED

ERRATUM

(Appeal No. 88-1090)

TEXAS INSTRUMENTS INC., APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE, AND SAMSUNG Co., LTD., AND SAMSUNG SEMICONDUCTOR & TELECOMMUNICATIONS Co., LTD., INTERVENORS

(Appeal No. 88-1177)

SAMUNG Co., LTD., AND SAMSUNG SEMICONDUCTOR & TELECOMMUNICATIONS Co., LTD., APPELLANTS *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE, AND TEXAS INSTRUMENTS INC., INTERVENOR

(Decided March 28, 1989)

Please make the following corrections to Appeal Nos. 88-1090 and 88-1177, published in the CUSTOMS BULLETIN, Vol. 23, No. 16, dated April 19, 1989:

Page 32, line 2, change "Japan" to "Korea".

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo

Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford
Frederick Landis
Herbert N. Maletz
Bernard Newman
Samuel M. Rosenstein
Nils A. Boe

Clerk

Joseph E. Lombardi



Decisions of the United States Court of International Trade

(Slip Op. 89-66)

IPSCO, INC. AND IPSCO STEEL, INC., PLAINTIFFS AND THE ALGOMA STEEL CORP., LTD. AND SONCO STEEL TUBE DIV. FERRUM, INC., PLAINTIFF-INTERVENORS V. UNITED STATES, DEFENDANT, AND LONE STAR STEEL CO., DEFENDANT-INTERVENOR

Court No. 86-06-00753

[ITA determination affirmed in part; remanded in part.]

(Dated May 18, 1989)

Barnes, Richardson & Colburn (Rufus E. Jarman, Jr., Karin M. Burke, Josephine N. Belli) for plaintiffs.

Dow, Lohnes & Albertson (William Silverman, Carrie A. Simon, Douglas J. Heffner) for plaintiff-intervenor Sonco Steel.

John R. Bolton, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch, (Platte B. Moring, III), Civil Division, United States Department of Justice for defendant; (Craig L. Jackson) Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

Dewey, Ballantine, Bushby, Palmer & Wood (Michael H. Stein, Audrey Winter) and Akin, Gump, Strauss, Hauer & Feld (Warren E. Connelly, Valerie A. Slater, and Angela J. Paolini) for defendant-intervenor.

OPINION

RESTANI, *Judge*: Plaintiffs, Ipsco, Inc. and Ipsco Steel, Inc. (Ipsco) bring this action challenging the final determination by the United States Department of Commerce, International Trade Administration (ITA) that oil country tubular goods (OCTG) from Canada are being sold in the United States at less than fair value. *Oil Country Tubular Goods from Canada*, 51 Fed. Reg. 15,029 (Apr. 22, 1986), as amended 51 Fed. Reg. 29,579. In its opinion of May 6, 1988, *Ipsco, Inc. v. United States*, 12 CIT —, 687 F. Supp. 633, the court remanded this action to ITA for reconsideration and a fuller explanation of the agency's reasons for treating limited service OCTG as a fully costed co-product of prime OCTG in its calculations of constructed value¹ and for a clarification of the agency's treatment of

¹Constructed value, which is based on cost of production is utilized as foreign market value when there are insufficient sales in the home market above cost of production. See 19 U.S.C. § 1677b(b) and (e) (1982 & Supp. IV 1986).

certain experimental merchandise exported to the United States. In its Remand Determination of September 2, 1988 (Remand Determination), ITA upheld its previous determination with regard to these two issues. Plaintiffs presently challenge these remand results.

DISCUSSION

I. ITA'S TREATMENT OF LIMITED SERVICE OCTG

In the previous opinion, the court ordered ITA to reconsider and explain why it had chosen to treat limited service OCTG as a fully costed co-product of prime quality OCTG in its calculations of constructed value rather than as a by-product of prime as requested by plaintiffs in their submissions to the agency. In the remand determination, after considering the use of the product and "whether the costs of production and sales value of the product are treated under Generally Accepted Accounting Principles ("GAAP") as co-products or by-products of the chief product," ITA determined that limited service OCTG is properly classified as a co-product of prime OCTG.² Remand Determination at 3.

In analyzing cost of production and sales value, ITA relied considerably on its finding that Ipsco treated its limited service pipe as a co-product of prime OCTG in certain financial statements which it claims are based on GAAP. In those statements, Ipsco did not accord limited service pipe by-product accounting treatment. Instead, the financial statements relied upon assign limited service pipe significant sales value and costs, both of which are reported along with the costs and sales value of the chief product. Such reporting, ITA concludes, is consistent with GAAP treatment of co-products. ITA acknowledges that Ipsco does not treat limited service OCTG as a co-product in its cost accounting system, but disregards this information because "Ipsco is not required to employ GAAP for its internal accounting." Remand Determination at 6 n.7.

Ipsco contests ITA's findings on this issue and claims that it did not treat limited service OCTG as a co-product for purposes of its financial statements. Ipsco claims that its cost accounting system, which was disregarded by ITA and which treats limited service pipe as a by-product, is prepared in accordance with GAAP. Furthermore, Ipsco contends that the financial statement relied on by ITA was an internal document for use by Ipsco for its own purposes and was not prepared in accordance with GAAP. Specifically, Ipsco claims that the cost figures would have to be adjusted downwards in order for the figures contained in this statement to comply with GAAP.

Briefing and argument following remand, however, have demonstrated that answering the question of whether limited service OCTG is properly categorized as a by-product or co-product of prime

²Simply put, under Generally Accepted Accounting Principles (GAAP) utilized in the United States the value of by-products is generally deducted from the other costs of producing the prime products, while costs are generally allocated among co-products. See C. Horngren, *Cost Accounting: A Managerial Emphasis*, 531-544 (5th ed. 1982).

OCTG does not resolve the pertinent issue before the court, that is, how cost of production and constructed value should be calculated for purposes of the antidumping laws if two differently valued and priced products are produced by the same production process. Before GAAP or any other ordinary costing methodology is used, ITA must determine if the statute, either expressly or impliedly, directs ITA to calculate cost of production and constructed value in some other way.

Plaintiffs do not contest the fact that limited service OCTG is subject to this investigation. In order for ITA to make the fair value comparisons required by law, ITA is obligated to arrive at a foreign market value for such limited service OCTG. Both the GAAP by-product accounting methodology proposed by plaintiffs and the equal allocation accounting methodology employed by ITA lead to a number of problems in this regard.

A. Plaintiffs' proposed by-product accounting methodology

Throughout these proceedings, plaintiffs have suggested two alternative methods for calculating constructed value. Plaintiffs proposed that ITA value limited service OCTG at either the uniform accounting cost utilized by Ipsco for purposes of its cost accounting system (an amount equal to the estimated market value of limited service OCTG) or alternatively, that such OCTG be value at its actual net realizable value. Either method, plaintiffs argue, would yield an amount to be credited against prime cost, consistent with GAAP and prior ITA practice. Plaintiffs further argue that the values which the by-product methodology yields should serve as the basis for foreign market value of the limited service product.

Plaintiffs' proposed methodology must be rejected. In reaching this conclusion, the court notes the significance of the fact that both primary and secondary OCTG products³ are subject to investigation in this case. In cases where either cost of production or constructed value is relevant to calculation of foreign market value, where secondary products are not subject to investigation, and where those secondary products may properly be characterized as by-products, plaintiffs' proposed methodology of deducting the value of the by-product from the other costs of production of the prime product would most certainly be reasonable and is, in fact, ITA's approach. See, e.g., *Fall-Harvested Round White Potatoes from Canada*, 48 Fed. Reg. 51,669, 51,673-74 (Nov. 10, 1983). The task of ITA in such cases is to examine the cost of producing the prime product. In such cases, ITA is not obligated to examine the cost of producing the secondary product. That is, the secondary product's statutorily defined foreign market value need not be determined, because no antidumping margin need be calculated for such product. In this case, howev-

³The court uses the term "secondary" as a matter of convenience to describe the lower value limited service product. The court does not thereby decide whether limited service OCTG is a by-product or a co-product of prime OCTG.

er, ITA was required to determine the foreign market value of the limited service product.

Plaintiffs have failed to cite any statutory authority supporting their contention that ITA simply may assign limited service OCTG a foreign market value based on its net realizable value or estimated market value. Rather, both the statute and ITA regulations set forth specific cost, expense and profit elements which must form the basis of constructed value. Plaintiffs' proposed methodology ignores these factors.

B. ITA's accounting methodology

Having concluded that the methodology proposed by plaintiffs would be contrary to law, the court is left to examine the approach taken by ITA to determine whether it is a reasonable application of the controlling law. ITA determined that limited service and prime OCTG are properly characterized as co-products and treated the products identically in its calculations of foreign market value. Even assuming *arguendo* that limited service OCTG is properly characterized as a co-product of prime, the court is unpersuaded that this would dictate the type of equal costing treatment employed by ITA and challenged by plaintiffs. Authorities on accounting seem to be in agreement that shared costs must be allocated between co-products or joint products,⁴ as opposed to the treatment afforded by-products. See, e.g., W. Morse and H. Roth, *Cost Accounting*, 147-162 (3rd ed. 1986). The authorities do not indicate, however, that co-products must be costed in an identical manner or that such costs must or should be allocated equally. Rather, they indicate that costs are normally allocated between the products according to various factors, including sales value. See C. Horngren, *Cost Accounting: A Managerial Emphasis*, 531-534 (5th ed. 1982) (stating that there are a number of methods for allocating costs between joint-products, the most common of which "allocate in proportion to some measure of the relative revenue-generating power identifiable with the individual products.") This most common allocation methodology would seem particularly appropriate in the context of a statutory scheme which is concerned with fair pricing. That is, ITA must choose an accounting methodology which fulfills the statutory purpose. Methodologies which may be acceptable for certain accounting purposes are not necessarily permitted by the statute in all circumstances.

By declining to account for differences in value and treating prime and limited service products identically in its calculations of foreign market value, ITA made an unreasonable fair value com-

⁴In its latest brief to the court, defendant admits that "allocation methodology would be appropriate in [a] joint products situation," but argues that the term "joint products" does not apply in this case because limited service and prime OCTG are not separately identifiable as distinct individual products but are instead the same OCTG product distinguishable only by a quality difference. Defendant's Answer to Questions Raised by the Court at 8-9. This argument stands in contrast to defendant's earlier arguments which focused almost entirely on categorizing limited service OCTG as a "co-product." The court has been made aware of no distinction relevant to this case between the terms "co-product" and "joint product." Regardless of labels, this matter deals with two products of admittedly different value produced simultaneously from a single set of inputs.

parison. Although some dispute exists as to the precise sales value of limited service OCTG relative to prime OCTG, it is not disputed that the value of limited service OCTG is generally lower, and for some grades of pipe greatly lower, than that of prime OCTG, and that this lower value is reflected in lower sales prices. See Ipsco Cost of Production Verification Exhibit No. C37 [at 335A]. It is now apparent that over half of the margin in this case is attributable to sales of limited service OCTG, at what may be fair, or fairer, low prices for the lower valued products. Defendant's Answers to Questions Raised by the Court at 7.⁵

The court finds that under the facts of this case, in order for ITA to comply with the statutory goal of arriving at a fair comparison, see *Smith-Corona Group v. United States*, 713 F.2d 1568, 1578 (Fed. Cir. 1983) cert. denied 465 U.S. 1022 (1984), it must find a reasonable means of allocating the combined cost of production between these two very differently valued products in a manner which takes into account such differences in value,⁶ see *Chemical Products Corp. v. United States*, 10 CIT 626, 636, 645, F. Supp. 289, 297 (1986), remand order vacated, 10 CIT 819, 651 F. Supp. 1449 (1986) (finding unreasonable and not in accordance with law ITA's failure to take into account the disparate values of two products yielded by the same production process when allocating factors of production between them), or ITA must adjust its overall methodology for calculating margins in some other way so as to account properly for the simultaneously produced second quality goods. Only when this is accomplished will the fair value comparison be sufficiently fair so as to satisfy the antidumping laws.⁷

⁵Costing which involves allocation on the basis of significantly different values may cause the pre-averaged margins for prime OCTG to rise. The court is unaware as to what the final margins would be.

⁶Both defendant and defendant-intervenor argue that if ITA assigns a cost to a product that is a function of the price charged for that product, foreign producers will be able to mask deliberate discriminatory pricing policies. They argue that the price charged for the product cannot be a factor in determining cost precisely because it is the producer's pricing policies which are subject to investigation in an antidumping case. If ITA does not believe the prices charged by Ipsco for the limited service and prime products accurately reflect their differing values, it is free to consider and use other measures of value including prices charged by the domestic industry for limited service and prime OCTG. In this case there seems to be substantial agreement that some significant differences in value do exist.

It should also be noted that a methodology which allocates actual costs of production according to some measure of value is entirely different from plaintiffs' suggested methodology which simply assigns a constructed value or cost of production to the limited service product which is equal to its value, and which, for the reasons discussed, *supra*, is contrary to the statute.

⁷Defendant-intervenor also argues that the court cannot find ITA's determination to be unlawful based on ITA's failure to consider a costing methodology which was not suggested by Ipsco in the administrative proceeding below. That Ipsco did not argue for a particular methodology which the court finds acceptable is not dispositive of this matter. The issue before the court is whether ITA's methodology which assigns equal costs to products of significantly different values is reasonable. Plaintiffs have pursued this issue throughout the administrative proceeding. In a case where ITA's method has been shown to be contrary to law and where plaintiffs have diligently pursued the issue, they are not necessarily to be denied all relief because they did not also perceive that their proposed remedial approach was also unacceptable. The peculiar facts of each case will determine how far a party must go in pointing out ITA's errors and an acceptable cure. After all, ordinarily ITA has a variety of acceptable methodologies from which to choose. In this case, after expressing its tentative views as to both plaintiffs' and ITA's errors, the court gave defendant ample opportunity to demonstrate that an allocation methodology which properly accounts for the significant differences in value of the two product groups at issue is not feasible or is inappropriate. Furthermore, ITA has not argued that its choice of methodology stems from an application of the "best information available rule," that is, that ITA cannot verify information necessary to apply a more appropriate methodology. See 19 U.S.C. § 1677e (1982 & Supp. IV 1986).

In *Ipsco, Inc. v. United States*, 13 CIT —, Slip Op. 89-50 (Apr. 18, 1989), the court upheld ITA's remand determination, in part, because no acceptable alternative methodology was suggested by plaintiffs. Examination of the record will reveal also that no acceptable alternative methodology was suggested by any of the parties or by the court during the course of litigation. In addition, although the court questioned ITA's overall valuation methodology, no party actually demonstrated that the basic methodology was contrary to law.

C. ITA's use of constructed value

Plaintiffs make the additional argument, as they did before ITA, see, e.g., Pub. Doc. 132 at 15 (Ipsco's Prehearing Brief), that if ITA were to apply the by-product methodology and treat the value figures derived therefrom (estimated market value or net realizable value) as the cost of production for limited service OCTG, it would find a significant number of home market sales of certain grades of that product to be above the cost of production and would not be forced to base foreign market value of all limited service OCTG on constructed value. See 19 U.S.C. § 1677b(a)(2) & (b) (1982). Plaintiffs aver that following this scenario ITA could compare sales prices of off-specification material in the United States with sales prices of certain off-specification material in the Canadian home market—the preferred actual price statutory comparison.⁸

As indicated above, the court finds contrary to law a methodology which simply equates cost of production or constructed value with estimated market value or net realizable value. Apart from having no basis in the statute it is difficult to envision any circumstances in which such an approach would lead to a finding of sales below the cost of production.⁹ The court notes, however, that although plaintiffs' methodology is flawed, plaintiffs have preserved the issue of whether constructed value must be used for all grades of merchandise. Thus, ITA, on remand, should use home market sales, rather than constructed value, as a basis for foreign market value for some grades, if after recalculating cost of production it finds that plaintiffs have demonstrated a sufficient number of home market sales of the limited service product above the cost of production so as to permit calculations on an actual home market sales basis for such grades. 19 U.S.C. § 1677b(a).

II. ITA'S TREATMENT OF EXPERIMENTAL PRODUCTS

In its previous opinion, the court rejected plaintiffs' arguments that certain sales of experimental merchandise must be excluded from U.S. price in order to make a fair comparison because ITA had acknowledged the experimental nature of these two products and made adjustments for the extraordinary costs associated with their production when it calculated foreign market value. The court stated that "[a]s the extraordinary nature of these products has already been factored into the foreign market value side of the equation, it would seem inconsistent to exclude sales of the same products from the United States price side of the equation." *Ipsco, Inc. v. United States*, 12 CIT —, 687 F. Supp. 633, 641 (1988). The court did ask

⁸Plaintiffs have never made clear to the court for which grades of limited service OCTG they believe there are a sufficient number of home market sales to allow for use of home market selling price in calculating foreign market value. Plaintiffs' counsel indicated at oral argument that the foreign market value of certain limited service products would, in any event, have to be based on constructed value.

⁹The court finds unpersuasive plaintiffs' argument that "cost of production" as used in this context is distinguishable in any way significant to this case from the cost of production utilized in calculating constructed value. See 19 U.S.C. § 1677b(e)(1)(A) (1982). The fact that the statute does not specifically define "cost of production" for the purpose of ITA's below cost of production investigation does not alter the plain fact that cost of production refers to costs, e.g., costs of materials and fabrication, which permit production of the subject merchandise.

ITA to clarify whether it was applying a blanket rule under which "it *must* include all U.S. sales not made in the ordinary course of trade," or whether it was "merely making what would seem to be a reasonable determination to include the sales at issue here." *Id.* at 642.

On remand, ITA makes clear that it was not applying a blanket rule and that it is department policy to exclude certain U.S. sales from the LTFV comparison, namely (1) sales which are not representative of the seller's behavior and (2) sales which are so small that they would have an insignificant effect on the margin. The first factor is relevant to this case. ITA concludes that while the agency did have information that the pipe at issue was experimental and that sales of this particular pipe might not have been made in the future, it is not unusual for a company to sell experimental lines of merchandise and there is no reason to believe that other types of experimental pipe would not be marketed in the future. ITA states that it is not possible for it to conclude that these sales were not representative of Ipsco's sales practices in the U.S. market. Plaintiffs challenge this conclusion and ask the court to remand this issue and order ITA to provide significant reasons for distinguishing between sales which reflect a company's behavior in the U.S. market and those which do not reflect, or are not representative of that behavior.

Initially, it should be noted that on remand ITA has provided the clarification of its policy which was requested in the previous opinion. Furthermore, underlying plaintiffs' arguments is their apparent belief that inclusion of these sales has somehow skewed the fair value comparison in a manner unfavorable to themselves. As explained in the previous opinion, this argument fails.

It also seems that if the court were to accept plaintiffs' arguments here, it would in effect be placing a burden on ITA to determine in every case whether each U.S. sale relied on is representative of the respondents' behavior. Such a burden would be considerable, has no basis in the statute, and might invite respondents to find innovative ways of immunizing U.S. sales from the dumping laws by merely labeling them "experimental." A more prudent approach would dictate instead that ITA exercise its discretion in this area and exclude sales only in those limited situations in which ITA finds that inclusion of certain sales which are clearly atypical would undermine the fairness of the comparison of foreign and U.S. sales. See *Asociacion Columbiana de Exportadores de Flores v. United States*, 13 CIT —, 704 F. Supp. 1114, 1126 (1989).

Plaintiffs also make much of the fact that ITA seems to admit these sales were not made "in the ordinary course of trade," Remand Determination at 8, and yet does not conclude that they were unrepresentative of the seller's behavior. Plaintiffs find this conclusion incongruous because they believe that a sale that is representative of a company's behavior in the U.S. market is "by definition" a

sale made in the ordinary course of trade. If the court were to adopt plaintiffs' view equating "ordinary course of trade" with "representative of a seller's behavior" it, in effect, would be ordering ITA to exclude all sales from U.S. price which are made outside the ordinary course of trade. In its previous opinion, the court ruled that this is not required and in some cases would undermine the purpose of the antidumping laws.

CONCLUSION

This matter is remanded. ITA shall issue a determination on remand within thirty days utilizing a methodology which eliminates the unfairness of failing to account for substantial differences in value of the two types of simultaneously produced products subject to investigation. Within ten days thereafter the parties shall advise the court whether post remand briefing is necessary, in which case a briefing schedule shall be proposed by plaintiff after consultation with opposing counsel. If ITA finds it necessary to reopen the investigation it shall so advise the court within 20 days hereof and shall, after consultation with the parties, propose a new schedule.

(Slip Op. 89-67)

SONCO STEEL TUBE DIV., FERRUM, INC., PLAINTIFF V. UNITED STATES,
DEFENDANT, AND LONE STAR STEEL CO., DEFENDANT-INTERVENOR

Court No. 86-07-00899

[ITA determination affirmed in part; remanded in part.]

(Dated May 18, 1989)

Dow, Lohnes & Albertson (William Silverman, Carrie A. Simon and Douglas J. Heffner), for plaintiff.

John R. Bolton, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch, (Platte B. Moring, III), Civil Division, United States Department of Justice, for defendant; (Craig L. Jackson) Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

Dewey, Ballantine, Bushby, Palmer & Wood (Michael H. Stein) for defendant-intervenor.

OPINION AND ORDER

RESTANI, *Judge*: Plaintiff, Sonco Steel Tube Division, Ferrum, Inc. (Sonco) brings this action challenging the final determination by the Department of Commerce, International Trade Administration (ITA) that oil country tubular goods (OCTG) from Canada are being sold in the United States at less than fair value. *Oil Country Tubular Goods from Canada*, 51 Fed. Reg. 15,029 (Apr. 22, 1986), as amended, 51 Fed. Reg. 29,579 (Aug. 19, 1986). In its opinion of August 18, 1988, *Sonco Steel Tube Div., Ferrum, Inc. v. United States*,

12 CIT —, 694 F. Supp. 959 (1988), the court remanded this action to ITA for (1) a reconsideration and a fuller explanation of the agency's reasons for treating limited service OCTG as a fully-costed co-product of prime OCTG in its calculations of constructed value, (2) an explanation of why certain U.S. sales, which appeared unrepresentative of plaintiff's selling practices in the U.S., were included in the fair value comparison, and (3) a fuller explanation of why early payment discounts provided to Sonco's customers were treated as reductions in U.S. price while no adjustments for such discounts were made to foreign market value. In its remand determination, dated November 1, 1988, ITA determined that the sales which plaintiff alleged were unrepresentative of its selling practices in the U.S. were in fact unrepresentative and excluded such sales from the fair value comparison. As a result of this exclusion, ITA calculated a new less than fair value margin of 3.18%. Upon remand, ITA adhered to its previous determination with regard to the remaining two issues. Plaintiff presently challenges these remand results.

I. ITA'S TREATMENT OF LIMITED SERVICE OCTG

Plaintiff's arguments concerning ITA's treatment of limited service OCTG are essentially identical to those made by Ipsco, Inc., another Canadian producer of OCTG subject to this same investigation, in its challenge to ITA's final determination. Accordingly, the court's views on plaintiff's proposed by-product accounting methodology and on the accounting methodology actually employed by ITA as expressed in *Ipsco, Inc. v. United States*, 13 CIT —, Slip. Op. 89-66 (May 18, 1989) are equally applicable in this case and need not be repeated in detail here.

In summary, the court found Ipsco's proposed methodology which simply assigns limited service OCTG a cost of production and/or constructed value equal to its actual net realizable value or estimated market value to be contrary to both the statute and ITA regulations. Additionally, the court found the methodology employed by ITA to be unreasonable because it failed to account for significant differences in value between the prime and limited service product in its calculations of foreign market value. In this case, as in *Ipsco*, this matter is remanded to ITA so that the agency may adopt a methodology for calculating foreign market value which eliminates the unfairness of failing to account for significant differences in value between the two types of simultaneously produced products subject to investigation.

II. ITA'S TREATMENT OF EARLY PAYMENT DISCOUNTS

In the previous opinion, the court questioned ITA's decision to treat early payment discounts provided to Sonco's U.S. customers as reductions in U.S. price while making no adjustments to foreign market value to account for similar discounts offered on home mar-

ket sales of the same general class of merchandise as OCTG. Specifically, ITA was ordered to:

clarify whether it is agency policy to account for differing early payment discounts in the respective markets using a circumstances of sale adjustment, and if so under what circumstances. If a circumstances of sale adjustment could have been made here, ITA should indicate why plaintiff has not demonstrated entitlement to such an adjustment. If it is not agency policy to make circumstances of sale adjustments for early payment discounts, ITA must explain why it has made no other adjustment to constructed value.

Sonco, 12 CIT at —, 694 F. Supp. at 965. In connection with its clarification of these points, ITA was directed to explain its decision in *Tool Steel from the Federal Republic of Germany*, 51 Fed. Reg. 10071 (Mar. 24, 1986), a previous determination in which the agency permitted early payment discount adjustments to foreign market value based on constructed value.

In the remand determination, ITA has provided the clarification requested by the court, stating that it does not have a policy of treating early payment discounts as circumstances of sale for which adjustments to foreign market value may be made and that it has been substantially consistent in following a policy of treating such discounts as reductions in price. In response to the court's concerns regarding the *Tool Steel* determination, ITA states, *inter alia*, "[t]o the extent that the case does indicate that the Department treated a discount as a circumstances of sale adjustment, the case is simply wrong," Remand Determination at 13. On the other hand, plaintiff argues that ITA's statements to the contrary notwithstanding, the agency does have a policy of granting circumstances of sale adjustments for early payment discounts and that ITA's actions in this case were unreasonable.

Initially, it should be noted that discounts generally provided to customers in either the U.S. or home market do lower the final price to such customers and it is therefore not *per se* unreasonable for ITA to treat certain discounts as reductions in price in its calculations of foreign market value and U.S. price.¹ Although it remains unclear as to whether the adjustment made in *Tool Steel* was, in

¹Plaintiff argues that ITA's policy on early payment discounts as expressed in the remand determination is inconsistent with the decision of the Court of Appeals for the Federal Circuit in *Smith-Corona Group, Consumer Prods. Div., SCM Corp. v. United States*, 713 F.2d 1568 (Fed. Cir. 1983), cert. denied 465 U.S. 1022 (1984). Plaintiff's reliance on *Smith-Corona* is misplaced. *Smith-Corona* deals with the issue of whether certain periodic and monthly rebates based on sales volume were directly related to the sales under consideration. See 19 C.F.R. § 353.15 (1988). On its face, the case does not appear to address directly the more general issue of whether circumstances of sale adjustments may properly be made to foreign market value for rebates and discounts. Nonetheless, in *Zenith Radio Corp. v. United States*, 9 CIT 110, 115-16, 606 F. Supp. 695, 700-01 (1985) *aff'd* 783 F.2d 184 (Fed. Cir. 1986), *Smith-Corona* is interpreted as standing for the proposition that circumstances of sale adjustments under 19 U.S.C. § 1677b(a)(4)(B) may be made for rebates. The distinction between reduction in price and circumstances of sale apparently was important because of certain limitations on home market sales price reductions. In any case, neither *Smith-Corona* nor *Zenith* can be read to require ITA to treat all discounts or rebates in this manner. Likewise, neither case addresses the specific issue before this court, namely, whether ITA may properly treat early payment discounts as reductions in price. Plaintiff's *Smith-Corona* argument also assumes that all rebate and discount programs are analogous. In fact, such programs may have different effects requiring different treatments.

fact, a circumstances of sale adjustment,² ITA in its remand determination clearly repudiates the treatment of early payment discounts in this manner. See Remand Determination at 13. Furthermore, it is clear that ITA's policy of treating early payment discounts as reductions in price has been followed in most of its determinations. See Remand Determination at 13 n.10 (listing previous determinations in which ITA treated early payment discounts reductions in price).³ Given ITA's definitive statement of its present policy and the extent of its consistent past practice, the court does not find that ITA acted unreasonably or arbitrarily in this case based on the existence of the relatively few previous determinations cited in which the department may appear to have acted inconsistently.⁴

The court also notes an additional problem with plaintiff's request that the ITA grant a circumstances of sale adjustment for the difference between "the discounts provided by Sonco in the United States and the discounts that Sonco provided in Canada on the same class or kind of merchandise." Plaintiff's Comments on the Remand Determination at 22. As stated in ITA's remand determination, ITA "does not consider discounts to be actual expenses borne by a manufacturer, and as such did not include them in figure for general expenses when calculating constructed value." Remand Determination at 16 n.11. Had ITA treated these discounts as

²Defendant suggests that the fact that there were home market sales (which were found to be made at prices below the cost of production) in *Tool Steel* for which discounts may have been granted, whereas there were no home market sales of OCTG in this case and, hence, no home market discounts, may explain why an adjustment was made to constructed foreign market value in *Tool Steel* and not here. In actuality, ITA is uncertain as to the meaning of *Tool Steel*. It should be noted, however, that there is no clear authority under which ITA may calculate constructed value one way in cases where there are no home market sales, and another way in cases where home market sales are disregarded because they were made at prices below the cost of production.

Additionally, the court is somewhat disturbed by ITA's inability to explain fully the agency's own previous determinations. Although the agency is not necessarily bound by its previous determinations, a finding as to the reasonableness of the agency's actions in a given case may depend, in part, on the agency's treatment of similar issues in previous cases. Whether or not ITA's inability to explain *Tool Steel* is understandable given changes of personnel, such inability may be prejudicial to the opposing party. Here, ITA's calculation seems to be essentially fair and non-arbitrary. Thus, plaintiff is not prejudiced.

³Plaintiff cites *Cyanuric Acid and Its Chlorinated Derivatives from Japan*, 49 Fed. Reg. 7424 (Feb. 29, 1984) in support of its position that a circumstances of sale adjustment should be made for early payment discounts. In that determination, ITA stated that in calculating foreign market value based on home market prices it "made deductions, where appropriate, for after-sales rebates and discounts based upon competitive circumstances." *Id.* at 7425. In the remand determination in this case, ITA states that *Cyanuric Acid*, in fact, supports its position in this case. Remand Determination at 14.

Upon examination of the cited determination, it appears that it does not provide conclusive support for either plaintiff's or ITA's position. The rebates and competitive discounts at issue in *Cyanuric Acid* consisted of home market after-sale cash rebates and additional merchandise shipped at no extra cost. In order to account for these rebate and discount programs, ITA adjusted foreign market value downwards. Although ITA's response to petitioner's comment 6, 49 Fed. Reg. at 7428, at least, implies a circumstances of sale adjustment was made, most likely the distinction at issue here was not of consequence under the facts of the case. That is, an allowable reduction in price applicable to foreign market value may have the same effect as a downward adjustment to foreign market value based on a difference in circumstances of sale.

In *Monsanto Co. v. United States*, 12 CIT —, 698 F. Supp. 285 (1988), which dealt with later cyanuric acid determinations, a program involving shipment of additional merchandise is referred to as a "rebate," for which a circumstances of sale adjustment is allowed. In actuality, the court simply upheld ITA's treatment of the program as a "deduction to foreign market value." Distinctions between mandatory and permissible treatment of such programs, between price reductions and circumstances of sale adjustments, and among various discount and rebate programs were not addressed.

⁴Only two cases appear to fall into this category, *Tool Steel and Carbon Steel Wire Rod from Brazil*, 49 Fed. Reg. 14,156 (Apr. 10, 1984). The remaining cases cited for this proposition are inconclusive. See also note 3.

Plaintiff also argues that ITA's claim that it does not grant circumstances of sale adjustments for early payment discounts directly contradicts statements made by the Department of Commerce in a November 1985 report submitted to Congress entitled, *Study of Antidumping Adjustments Methodology and Recommendations for Statutory Change*. As defendant notes, however, the section of the report cited by plaintiff is not a discussion of circumstances of sale adjustments and, in fact, immediately precedes the section of the report devoted to circumstances of sale adjustments.

expenses, the agency presumably would have utilized discount rates provided by Sonco in the home market on "merchandise of the same general class or kind as the merchandise under consideration," pursuant to 19 U.S.C. § 1677b(e)(1)(B), in its calculation of constructed value. It might be argued that in such a situation, a circumstances of sale adjustment would be appropriate to factor out differences between the United States discount rate and the home market discount rate utilized in the constructed value calculation. This is precisely the method by which ITA calculated differences in credit expenses provided in each market for which a circumstances of sale adjustment was granted. Remand Determination at 16 n.11. Because, however, ITA determined that discounts are not expenses to be included in its calculation of constructed value, and because plaintiff has failed to demonstrate that this decision was in any way contrary to law,⁵ ITA was not obligated to consider discounts made on sales of the same general class or kind of merchandise in the home market or make the sort of adjustment requested here by plaintiff, but rather could treat the discounts as reductions in price.

Having found that ITA may treat the early payments discounts at issue here as reductions in price and that ITA is not required to make the requested circumstances of sale adjustment under the facts of this case, there remains the question of whether some other type of adjustment or deduction to foreign market value to account for the early payment discounts was necessary. Neither defendant's nor plaintiff's comments on the *Tool Steel* case have convinced the court that an adjustment of any type to foreign market value was necessary to account for the early payment discounts under the facts of this case. In fact, plaintiff has not explained what the statutory basis for such an adjustment to constructed value might be, other than a circumstances of sale adjustment, and the necessity of such an adjustment has already been rejected as a basis for relief.⁶ Accordingly, the court does not find that ITA erred in failing to make an adjustment to foreign market value to account for early payment discounts.

⁵Plaintiff's argument that Sonco's early payment discounts should be viewed as expenses to the producer rather than as reductions in price is not persuasive. Foregoing sales revenue, under any circumstances, may be loosely characterized as a cost to a producer. While plaintiff correctly notes that ITA has treated certain types of imputed or opportunity costs as real expenses in previous determinations, see, e.g., *Industrial Phosphoric Acid from Belgium*, 52 Fed. Reg. 25,436, 25,438-39 (Jul. 7, 1987) (finding the opportunity cost of holding inventory to be a real expense which may be deducted from exporter's sales price), it has failed to cite any authority indicating that ITA has a practice of treating discounts in this manner or which would require ITA to treat discounts as general expenses which must be included in ITA's calculation of constructed value under 19 U.S.C. § 1677b(e)(1)(B).

⁶If in this case, actual home market sales were being used as the basis for foreign market value, and early payment discounts were also given on those sales, ITA, for the reasons discussed *supra*, could treat discounts as reductions in price on both sides of the fair value equation. Here, however, the only "prices" used are U.S. prices, thus home market "prices" cannot be reduced. Although *Timken Co. v. United States*, 11 CIT —, 673 F. Supp. 495, 507-8 (1987) indicates that circumstances of sale adjustments may be made even when foreign market value is based on constructed value, see also *Funai Elec. Co. v. United States*, 13 CIT —, Slip Op. 89-65 at 5-10 (May 15, 1989), it does not stand for the considerably broader proposition that any type of calculation or adjustment that can be made to price-based foreign market value must also be made to constructed value-based foreign market value.

CONCLUSION

This matter is remanded. ITA shall issue a determination on remand within thirty days utilizing a methodology which eliminates the unfairness of failing to account for substantial differences in value of the two types of simultaneously produced products subject to investigation. Within ten days thereafter the parties shall advise the court whether post-remand briefing is necessary, in which case a briefing schedule shall be proposed by plaintiff after consultation with opposing counsel. If ITA finds it necessary to reopen the investigation it shall so advise the court within 20 days hereof and shall, after consultation with the parties, propose a new schedule.

(Slip Op. 89-68)

HOUSE OF LLOYD, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85-04-00508

[Judgment for plaintiff.]

(Dated May 18, 1989)

Herbert Peter Larsen for plaintiff.

John R. Bolton, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, (*Mark A. Sochaczewsky*), Civil Division, United States Department of Justice, for defendant.

OPINION

RESTANI, *Judge*: This matter is before the court on plaintiff's motion for summary judgment. The issue before the court is whether for tariff purposes a lighted "angel shaped" decoration for the top of a Christmas tree is a doll or a species of electrical article.

FACTS

The merchandise at issue was imported from Taiwan in 1983 and 1984. It is described on the cardboard box in which it is packaged for sale as a 10 Light 9" Angel Tree Top with a 72 inch wire cord.¹ The package also indicates that the merchandise has a "UL² listed safety fuse plug for current overload protection." The portion of the cord which is within the "angel" contains small colored lights of a type normally found on Christmas decorations. The parties agree that the merchandise is self-illuminating and is used to adorn the tops of Christmas trees.

The merchandise consists of a plastic "head" with a light in it, wire and gauze "wings," a paper "collar," a red ribbon "bow" on the "collar," two arm-like projections made of wire, paper and gauze, each of which holds a light, a wire spring-like projection beneath

¹The device is actually somewhat less than 8" high.

²UL is an abbreviation of Underwriters Laboratory.

the "head," presumably used to secure the device to the Christmas tree top and a wire and gauze conical form, suggesting a gown, in which there are seven lights. The entire device bears a suggestion of a humanoid, but except for the "head" there is not much about the device which is doll-like.³

The merchandise, however, was classified by Customs under item 737.24, Tariff Schedules of the United States (TSUS), as "Dolls (with or without clothing): Other [than stuffed]." Plaintiff makes a claim for classification under item 688.43, TSUS, "Electrical articles * * * not specially provided for: Other," and, alternatively, for classification under item 688.10, TSUS, "Insulated * * * electrical conductors * * * With fittings: Christmas-tree lighting sets, with or without their bulbs, and wiring sets similar thereto."

ARGUMENT

Plaintiff relies primarily on the case of *Janex Corp. v. United States*, 80 Cust. Ct. 146, C.D. 4748 (1978). *Janex* involved "Raggedy Ann and Andy Nite Timers." The articles were described as:

* * * plastic figures, approximately 8¼ inches in height, representing the form and features of the well-known storybook characters, Raggedy Andy and Raggedy Ann. The figures have a hollow interior which accommodate two "D" size dry cell batteries, electrical switches, wiring, a bulb and other electrical components for illumination through the top of the figures. The articles are designed to light automatically when lifted off a surface (i.e., a dresser top), and switch off when set down again. This operation is accomplished by a pressure switch, which protrudes through the figure's feet when the article is lifted off a surface, and is depressed when the figure is set down again. Additionally, each figure has a pull-cord switch with a ring attached by which the light may be turned on for a brief period and then automatically turned off. Activation of the pressure or pull-cord switches, in addition to making the light turn on and off, also causes the figure's eyes to raise and lower simultaneously with turning the light on and off. (Footnote omitted.)

80 Cust. Ct. at 148. The articles were found to be more than dolls and were classified as electrical articles.

The defendant's argument is essentially that the *Janex* articles served an illumination function that is more substantial than any such function which may be attributable to the "tree toppers." Defendant states that the lights within and on the tree topper illuminate the tree topper itself and the parties appear to agree that the tree topper does not illuminate the surrounding area to any significant degree.⁴ Defendant further argues that because the main pur-

³A porcelain "headed" article of similar purpose, but of more substantial materials was submitted as an exhibit. It is not accepted by the court as it does not represent the imported merchandise at issue.

⁴The "angel" lights may also illuminate the tree. The parties do not explain why this is essentially different from the illumination function in *Janex*. The court presumes that any illumination of the tree is incidental. In any case, the parties agree that the articles are not "illuminating". Thus, they are not classifiable, along with other metal environmental lighting articles, under item 653.37, TSUS.

pose of the tree topper is decorative and because dolls may be decorative objects, rather than only playthings, the tree topper is not more than a doll.

Basically, defendant views this article as a lighted doll. The court cannot accept a blanket rule that every decorative article with some doll-like feature is simply a doll. This article consists of a string of lights which is worked into the angel shape and head and attached to the wire tree top holder to make the lights suitable for the top of the tree as opposed to encircling the tree. In *Janex*, the court found that the doll-shaped covering for the night light did not make the article more than an electrical article because such a "housing" is not inimical to the broad meaning of "electrical articles." 80 Cust. Ct. at 156. This electrical article, that is, the tree topper, is intended to be decorative, rather than a means of environmental illumination, and the decorative aspect of the electrical article is enhanced by the angel-shaped housing.

The court also notes that one cannot simply remove the electrical parts and create a doll. Physically one would have to destroy the "angel" housing to remove the electrical parts. Assuming one could detach the lights from the "angel" housing without harming the housing, it is difficult to say what would be left. The commercial value of the "angel" would seem to be negligible, apart from its function as part of the *lighted* tree top decoration.

As the court has determined that this article is not a doll or is more than a doll, the next question to be answered is whether the article is a specific type of electrical article, that is, a Christmas tree lighting set, or whether it is more, in which case it would be categorized as a non-specific electrical article. The category "Christmas-tree lighting sets" under item 688.10, TSUS, is a subcategory of "Insulated * * * electrical conductors * * * With fittings." A subcategory cannot encompass an article which is not in the broader category of which it is a subset.⁵ Neither party has briefed in any detail the issue of whether this merchandise is beyond the meaning of "Insulated * * * electrical conductors * * * With fittings," but plaintiff appears to accept that the angel shape or "housing" and tree top attachment makes this article more than "Insulated * * * electrical conductors * * * With fittings." See Plaintiff's Supporting Memorandum at 7. Defendant's only relevant statement as to this potential classification is "'* * * we would not characterize the electric lights as a Christmas tree lighting set.'" Defendant's Memorandum at 3, note 2. Needless to say, neither party has shown much enthusiasm for classification under item 688.10, TSUS. The court also concludes upon examination of the article that it is either more than, or something other than, "Insulated * * * electrical conductors * * * With fittings" or a "Christmas-tree lighting set." Accordingly, the

⁵General Interpretative Rule 10(c)(i), TSUS, states "a superior heading cannot be enlarged by inferior headings indented under it but can be limited thereby."

merchandise at issue is found to be classifiable under item 688.43, TSUS, other non-specific electrical articles.

(Slip Op. 89-69)

METALLVERKEN NEDERLAND B.V. AND OUTOKUMPU METALLVERKEN INC.,
PLAINTIFFS v. UNITED STATES, DEFENDANT, AMERICAN BRASS, ET AL. DEFEN-
DANT-INTERVENORS

Court No. 88-09-00711

Attorneys who have not signed a stipulation and protective order for access to confidential information are not subsumed under a provision for "authorized personnel" in the stipulation filed in this case. Each attorney who has been or will be given access to confidential information should sign this stipulation and protective order, which will be submitted to other parties for signature and to the Court for approval.

(Decided May 18, 1989)

Winthrop, Stimson, Putnam & Roberts (Thomas V. Vakerics, Kenneth Berlin, Mark A. Monborne, James A. Meade, and Jomi A. Laura); Arent, Fox, Kintner, Plotkin & Kahn (Stephen L. Gibson, Callie Georgeann Pappas, and Jerome Akman) for plaintiffs.

John R. Bolton, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (M. Martha Ries); United States International Trade Commission (Calvin H. Cobb, III), for defendant.

Collier, Shannon, Rill & Scott (David A. Hartquist, Jeffrey S. Beckington, and Kathleen Weaver Cannon) for defendant-intervenors.

DiCARLO, Judge: Plaintiffs move for clarification of the terms of a stipulation and protective order (SPO) which grants limited access to confidential business information. The issue is whether attorneys can be granted access to confidential information without formally signing the SPO. The Court finds that attorneys who have not signed the SPO are not "authorized personnel" under paragraph 6 or 7 of the SPO, and holds that each attorney given access to confidential information should sign the SPO, which will be submitted to other parties for signature and to the Court for approval.

BACKGROUND

The attorneys at Winthrop, Stimson, Putnam & Roberts seek clarification of the terms of the SPO to determine whether attorneys who have not signed the original stipulation may gain access to confidential information by following procedures for "authorized personnel" rather than signing the SPO itself. The procedure for "authorized personnel" requires office personnel to acknowledge that the business proprietary information is confidential and promise that confidential information shall be disclosed only to authorized personnel.

The relevant portions of the SPO provide:

5. Pursuant to this stipulation and subject to [its] terms and conditions * * *, access to the [confidential] [d]ocuments is granted to the following attorneys ("Counsel") for the [p]laintiffs, * * *.

6. Counsel receiving confidential information pursuant to this order shall not disclose confidential information to anyone (including without limitation any officer, shareholder, director, or employee of any of the parties in this civil action) other than their immediate office personnel actively assisting in this litigation.

7. Counsel shall cause all personnel authorized to see confidential information, including immediate office personnel actively assisting in this litigation, to comply with the terms of this stipulation and protective order. Counsel shall cause all office personnel authorized to see confidential information to sign a statement of acknowledgement that the information is confidential and that such confidential information shall not be disclosed to anyone other than authorized personnel within their law firms.

DISCUSSION

Antidumping and countervailing duty actions require that certain documents, comments, and information be accorded confidential status because even inadvertent disclosure of business proprietary information can be highly damaging and irreparable by conventional legal remedies. *SNR Roulements v. United States*, 13 CIT —, 704 F. Supp. 1103, 1107 (1989); *Chevron U.S.A., Inc. v. United States*, 11 CIT —, Slip Op. 87-13, at 6 (Feb. 6, 1987); Garfinkle, *Disclosure of Confidential Documents Under the Trade Agreements Act of 1979: A Corporate Nightmare?*, 13 Law & Pol'y Int'l Bus. 465 (1981). Release of business proprietary information to attorneys has been permitted under protective order because the sanctions for violating the order, including disbarment from practice before the United States Department of Commerce under 19 C.F.R. § 355.20(e) (1988), disbarment from practice before the United States International Trade Commission under 19 C.F.R. § 353.30(e) (1988), and the further prospect of professional disbarment, provide sufficient deterrence against disclosure of information submitted in confidence by foreign producers and their governments. *SNR Roulements*, 13 CIT at —, 704 F. Supp. at 1107; *D & L Supply Co. v. United States*, 12 CIT —, 693 F. Supp. 1179, 1182 (1988). Additional sanctions in recently published regulations are also available for violation of a protective order. *FAG Kugelfischer Georg Schaeffer KGaA v. United States*, 13 CIT —, 704 F. Supp. 1111, 1113 (1989); *Procedures for Imposing Sanctions for Violation of an Antidumping or Countervailing Duty Protective Order*, 53 Fed. Reg. 47,916, 47,921 (Nov. 28, 1988) (to be codified at 19 C.F.R. § 354.3).

The terms of the SPO in this case contemplate that each attorney working on the case, as an officer of the Court, has a direct responsibility to the Court to assure full compliance with the protective order. At the next level of accountability, primary experts make specific promises to be bound by the SPO and to safeguard confidential information. Clerical personnel are expected only to acknowledge that the information is confidential and promise not to disclose the information is confidential and promise not to disclose the information to unauthorized persons. The SPO is structured so that counsel have primary responsibility to supervise their expert and clerical personnel.

The "authorized personnel" procedure described in paragraphs 6 and 7 of the SPO permits access to confidential information based upon a reasonable balance between the administrative burden inherent in requiring a new SPO for each clerical staff member who may come into contact with protected information, and the need to protect confidential information from unauthorized disclosure.

Counsel for the government argue that the security derived from continuing to require all attorneys to sign the stipulation and protective order outweighs the administrative burden corresponding to this process. Counsel for the government argues:

While counsel [for plaintiff] may not know in advance which clerical personnel will be available to work on a particular case, a firm can be held to know which attorneys will staff the case and not to add lawyers who need access to confidential information on an *ad hoc* basis.

Treating attorneys differently from clerical personnel has important security benefits. Attorneys are different from clerical personnel in that attorneys are expected to (i) have more extensive and intimate contact with the confidential information, and (ii) take responsibility to supervise and direct clerical personnel concerning the handling of confidential information. The more remote the relationship between the signatory of a stipulation and protective order and the clerical personnel handling the confidential information, the more tenuous becomes the link of personal responsibility and accountability to the Court, and the more likely inadequate supervision will contribute to unauthorized disclosure. Moreover, the stipulation and protective order procedure is necessary to give other parties the opportunity to approve persons obtaining access to confidential information or notify the Court if there are reasons a certain attorney should not be given access to confidential information. Finally, to the extent the stipulation and protective order is breached, the Court's sanction power is more effective against attorneys who have signed the order.

The protection of confidential information is the paramount purpose of the stipulation and protective order process. The limited disclosure provisions are also designed to ensure the ability of Commerce and the Commission to obtain confidential information in fu-

ture investigations. See *American Brass v. United States*, 12 CIT —, 699 F. Supp. 934, 938 (1988); *A. Hirsch, Inc. v. United States*, 11 CIT —, 657 F. Supp. 1297, 1302 (1987). Under the terms of the SPO in this action, the Court holds that each attorney who has been or will be given access to confidential information should sign the SPO, which will be submitted to other parties for signature and to the Court for approval.

CONCLUSION

Under the terms of the SPO filed in this action, attorneys who have not signed the SPO are not subsumed under the provisions for "authorized personnel" in paragraph 6 or 7. The Court holds that each attorney who has been or will be given access to confidential information should sign the SPO, which will be submitted to other parties for signature and to the Court for approval.

(Slip Op. 89-70)

MOSS MANUFACTURING CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85-04-00593

[Judgment for defendant; case dismissed.]

(Dated May 22, 1989)

Peter S. Herrick for plaintiff.

John R. Bolton, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office (*Kenneth N. Wolf*, *Mark Sochaczewsky* and *Judith M. Barzilay*) for defendant.

OPINION

CARMAN, *Judge*: Plaintiff, Moss Manufacturing Co., Inc. (hereinafter Moss or buyer), commenced this action pursuant to 28 U.S.C. 1581(a)(1982), contesting defendant United States Customs Service's (Customs) appraisal of certain ceiling fans it imported from Taiwan. Moss contends that Customs improperly overstated the appraisal by including monies Moss disbursed to the seller, C.E.C. Electrical Manufacturing Co. (hereinafter CEC or seller), for later payment to Moss's buying agent DMZ Offshore Services, Ltd. (hereinafter DMZ or buying agent). Moss claims that these disbursements to the seller were commissions for the buying agent's services and should not have been included as part of the transaction value upon which duties are levied under section 402(b) of the Tariff Act of 1930 as amended by Title II of the Trade Agreements Act of 1979, 93 Stat. 194. 19 U.S.C. § 1401a(b) (1982).

Moss argues that the dutiable value is the price actually paid or payable exclusive of the alleged buying commission even though the buying commission was paid to the buying agent indirectly, by including it in the amount paid to the seller. Moss alleges the monies it disbursed to the seller CEC for later payment to Moss' buying agent DMZ, was a *bona fide* buying commission and not for the benefit of the seller. Consequently, Moss argues, it should have been excluded from the calculation of the transaction value for appraisal purposes. Moss seeks judgment ordering a refund of duties and a holding that transaction value as defined in section 402(b), does not include buying commissions paid to the seller for remittance indirectly to the buying agent.¹

Customs asserts that Moss has failed to overcome the presumption of correctness which attaches to Customs appraisals, since it failed to establish that the appraisal and the assessment of duties by Customs were erroneous. Customs contends that the monies dispersed to the seller for remittance to the buyer's agent were properly included in the transaction value under section 402(b) because the disbursements were part of the total payment made to the seller CEC. Customs seeks to dismiss the action.

At issue is Custom's interpretation of section 402(b) of the Tariff Act of 1930 as amended. The parties agree that the proper statutory basis of appraisal is transaction value as defined in section 402 of the Act, the pertinent part of which states:

¹In the complaint Moss also alleged that inland freight charges and other services incident to the international shipment of the merchandise were also improperly included in the calculation of the appraised value. Complaint at ¶¶18-24. Moss claimed that Treasury Decision 84-235 is applicable to the valuation of their entry. *Customs Regulations Amendment Relating to Valuation of Imported Merchandise*, 49 Fed. Reg. 46,886 (Nov. 29, 1984) (hereinafter Treasury Decision). The Treasury Decision amended prior Customs practice to conform Customs regulations to the Agreement on Implementation of Article VII of the GATT. The new customs regulation amended prior practice to exclude, rather than include, from the price paid or payable for imported merchandise, the costs for foreign inland freight and other services incident to the international shipment of merchandise which occur after the goods have been sold for export to the United States and are placed on a carrier for through shipment. 49 Fed. Reg. at 46,886; 19 C.F.R. § 152.103(a)(5) (1985).

At trial Moss appeared to have abandoned this argument. Moss' counsel mentioned in his opening argument that

[a]s set forth in the Treasury decision we made reference to in the complaint, the fact that the merchandise is packed ready for shipment at the exporter's premises, and when the bill of lading is created it's a true bill of lading from that point to the United States, and under current interpretation of inland freight and, on that basis it's a non-dutiable charge.

Trial Transcript at 8 (hereinafter Tr.). The only other reference to this claim occurred at the end of Customs' cross-examination of Monroe Zalkin when the Court engaged the witness in the following exchange:

THE COURT: Let's talk about the inland freight problem for just a moment. Have you ever paid separately for any kind of inland freight charges?

THE WITNESS: I don't know for sure, but I would speculate if there were inland freight charges, it was included in the letter of credit that the Hong Kong office pays, usually a small charge. It's a charge for hauling it from the vendor down to the dock.

THE COURT: Do you recall offhand if, on the commercial invoices that you received which are * * * represented by Plaintiff's Exhibit 1 in evidence showed separate costing passed onto Moss for inland freight?

THE WITNESS: I don't think they broke it out separately.

Tr. at 60-61.

The only other evidence pertaining to this claim was contained in Joint Exhibit 1, the original entry papers filed with Customs. It appears that included with the commercial invoice, consumption entry form, and the pro forma invoice, there was also a Carrier's Certificate which referred to a bill of lading for the merchandise subject to this protest. However, there is no other readily apparent explanation in the record which establishes that Customs improperly included charges for inland freight or other services incident to international shipment in its appraisal. Consequently, the Court finds the claim to be meritless.

§ 1401a. Value

(a) Generally

(1) Except as otherwise specifically provided for in this chapter, imported merchandise shall be appraised, for the purposes of this chapter, on the basis of the following:

- (A) The transaction value provided for under subsection (b) of this section.

* * * * *

(b) Transaction value of imported merchandise

(1) The transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States * * *.

* * * * *

(4) For the purposes of this subsection—

(A) The term "price actually paid or payable" means the total payment (whether direct or indirect, and exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States) made, or to be made, for imported merchandise *by the buyer to, or for the benefit of, the seller.*

19 U.S.C. § 1401a (emphasis added).

This Court must determine whether monies which were disbursed by the buyer to the seller with directions from the buyer to remit the monies to the buyer's agent, who assisted in bringing about the sale, were properly included in the transaction value for the purposes of appraisal by Customs under the terms of the statute.

On the basis of the evidence elicited at trial, the arguments of the parties, the relevant case law and all other papers submitted herein, the Court finds that Moss has not overcome the presumption of correctness which attaches to Customs' appraisal. Consequently, this Court affirms Customs' valuation of the merchandise.

THE TRIAL

The evidence in this case revealed that Moss imported 1,165 ceiling fans from the seller, CEC, in Taiwan and that CEC is a manufacturing firm entirely unrelated to Moss. Pretrial Order at 9 (Stipulations); *see also*, Plaintiff's Exhibit 8 (hereinafter P. Ex.). The merchandise was appraised by Customs at values higher than the entered and invoiced values submitted by Moss for the merchandise. The valuation determined in the appraisal and the liquidation included, in addition to the invoiced values, an amount of \$1,747.50 described as "brokerage fees." Pretrial Order at 9-10. These brokerage fees were the amounts paid by the buyer to the seller with in-

structions from the buyer to the seller to disburse the money to the buyer's agent who assisted in bringing about the sale.

At the trial the testimony of plaintiff's sole witness Monroe Zalkin, (Moss' president and chief executive officer), and eleven exhibits (nine submitted by plaintiff, one by the defendant and one as a joint exhibit) were presented. The evidence showed that Moss, the buyer, established DMZ as a separate entity in Hong Kong to source merchandise, negotiate prices and freight rates and otherwise represent Moss in the Far East. Tr. at 12.

A buying agency agreement entered into by the buyer Moss and its agent DMZ was filed with Customs. Tr. at 15. The agreement provided that the "buying commission and other charges shall be listed separately on the commercial and special Customs invoices prepared by the Agent." P. Ex. 4 at ¶5 (buying agency agreement); Tr. at 15, 32. Contrary to this agreement, the commercial invoice included with the official entry papers did not identify a payment of \$1,747.50 or any other payment as a buying commission, brokerage fee or any other charge. P. Ex. 1.

In order to pay for the ceiling fans, Moss opened a letter of credit with Standard Charter Bank of Miami, Florida in favor of the seller CEC. P. Exs. 3, 5. Under the terms of the letter of credit \$41,555.50 was to be paid to the seller for the 1,165 ceiling fans. The letter of credit required CEC, the seller of the merchandise, to remit \$1.50 per fan (\$1,747.50) to DMZ, the buyer's agent. P. Ex. 5. The letter of credit did not indicate the nature of the required payment from the seller CEC to the buying agent DMZ.

Zalkin testified that the banks issuing Moss' letters of credit requested Moss to make its payments to its buying agents in this fashion, and apparently Moss routinely employed this procedure. Tr. at 17, 18, 34. Zalkin stated that in the case at bar "we includ[ed] the buying commission and the cost of the goods and instructed the vendor [CEC] [to] remit the buying commission to our DMZ office." Tr. at 34. Zalkin further explained this arrangement: "The bank wanted us to do it in that way. It would have been easier to pay our company in Hong Kong directly but the bank wanted everything included in the invoice." Tr. at 18. Perhaps this indirect manner of payment was utilized because the banks refused to finance the buying commissions directly due to their small amounts. *See*, Defendant's Exhibit A at 20. Moss introduced into evidence a receipt acknowledging the transfer of proceeds in the amount of \$1,747.50 to the account of the buying agent DMZ but the receipt did not specify the source of the funds credited to the account. P. Ex. 7.

The evidence further showed that the seller CEC invoiced Moss \$40,515.50 for the 1,165 ceiling fans. Moss submitted this commercial invoice to Customs with its official entry papers. P. Ex. 1; Tr. at 15. The commercial invoice listed the quantity, unit and total prices for three different models of ceiling fans, and the total amount of the purchase price, but failed to specify any breakdown for buying

commission fees, inland freight or any other charges. P. Ex. 1. The pro forma invoice prepared by Moss, also submitted to Customs as part of the entry documentation, indicated a total payment to the seller CEC of \$41,555.50, with a breakdown of \$1,747.50 denominated as "Brokerage, Inspection Service Fee required to be remitted to [DMZ]." Joint Exhibit 1; P. Ex. 2.²

DISCUSSION

Moss has an additional burden since the appraisal decision of the Customs official and the assessment of duties pursuant to such decision are considered presumptively correct. 28 U.S.C. § 2639(a)(1) (1982); *Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70, 72, 733 F.2d 873, 876 (1984). The proper statutory basis of appraisal is transaction value, as defined and described in section 402(b) of the Tariff Act of 1930. 19 U.S.C. § 1401a(b). "The starting point in every case involving construction of a statute is the language itself." *Madison Galleries, Ltd. v. United States*, — F.2d —, —, Slip Op. 88-1559 at 4 (March 8, 1989) (citing, *Bethesda Hosp. Ass'n v. Bowen*, 108 S.Ct. 1255, 1258 (1988); *United States v. Turkette*, 452 U.S. 576, 580 (1981); *Watt v. Alaska*, 451 U.S. 259, 265 (1981)). Absent a clear cut legislative intent contrary to the statutory language, the statutory language is ordinarily regarded as conclusive. *Id.*

Transaction value is "the price actually paid or payable for the merchandise when sold for exportation to the United States," plus certain enumerated items not in issue here.³ 19 U.S.C. § 1401a(b)(1). The "price actually paid or payable" is defined as "the total payment (whether direct or indirect * * *) made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller." 19 U.S.C. § 1401a(b)(4) (emphasis added). It appears to this Court that the statute is unambiguous. According to its plain language, it is clear payments made to the seller by the buyer for the benefit of the seller must be included in the price paid or payable for the purpose of valuation. This Court holds where a payment for goods is made to a seller with instructions to disburse part of such funds to the buyer's agent, where the agent assisted in bringing about the sale, such disbursement constitutes a disbursement for the benefit of the seller within the meaning of 19 U.S.C. § 1401a(b) and is properly included within the price paid for purposes of valuation. Although the disbursement similarly benefits the buyer, this does not detract from the benefit to the seller. This conclusion appears consistent with prior case law and legislative enactments.

²There were discrepancies between the unit prices and the total prices on the commercial invoice provided by the seller CEC and the pro forma invoice provided by Moss which were never adequately explained. Zalkin conceded he could not explain the discrepancy between the unit prices on the CEC invoice and the pro forma invoice. Tr. at 51. The Court notes that the unit prices on the pro forma invoice prepared by Moss were undervalued by an amount that equalled the figure listed on the pro forma invoice as a brokerage fee (\$1,747.50)—the amount in dispute in this action.

³See, 19 U.S.C. § 1401a(b)(A)-(E), for the enumerated additions to the price paid or payable (e.g. packing costs, selling commissions, assists, royalty fees, etc.).

In 1979 Congress substantially overhauled the basis of valuation of imported merchandise to implement agreements reached during the Tokyo Round of Multilateral Trade Agreements conducted under the auspices of the General Agreement on Tariffs and Trade. The Trade Agreements Act of 1979 amended section 402 of the Tariff Act of 1930 to change the basis of valuation from export value to transaction value. Compare, section 402 (a) and (b) of Title IV of the Customs Simplification Act of 1956, 70 Stat. 943, (19 U.S.C. § 1401a(a) and (b) (1976)) (defining export value), with Title II of the Trade Agreements Act of 1979, 93 Stat. 194 (19 U.S.C. § 1401a(a) and (b) (1982)) (defining transaction value).

Inter alia, the Trade Agreements Act made two important additions to the prior statute. The definition of transaction value explicitly included selling commissions as a part of dutiable value. 19 U.S.C. § 1401a(b)(1)(B). Payments made for the "benefit of the seller" were also explicitly included in the definition of the price paid or payable for the merchandise and therefore subject to duties. 19 U.S.C. § 1401a(b)(4). Though the legislative history is silent as to their origin, these additions, along with other changes, appear to be the statutory incorporation of years of Customs Courts holdings. See, S. Rep. No. 249, 96th Cong., 1st Sess. 114-23, reprinted in 1979 U.S. Code Cong. & Admin. News 381, 500-509. In any event, these amendments were not inconsistent with prior judicial construction concerning the dutiability of commissions. Compare, e.g., *Dorf Int'l, Inc. v. United States*, 61 Cust. Ct. 604, 611, A.R.D. 245, 291 F. Supp. 690, 695 (1968) (selling commission dutiable under statute defining export value) with *Jay-ARR Slimwear, Inc. v. United States*, 12 CIT —, —, 681 F. Supp. 875, 878 (1988) (selling commission dutiable under transaction value statute); *J.C. Penney Purchasing Corp. v. United States*, 80 Cust. Ct. 84, 95, C.D. 4741, 451 F. Supp. 973, 982 (1978) (buying commission not dutiable under export value) with *Rosenthal-Netter, Inc. v. United States*, 12 CIT —, —, 679 F. Supp. 21, 23, *aff'd*, 861 F.2d 261 (Fed. Cir. 1988) (buying commission not dutiable under transaction value).

It is settled law under either statutory scheme that a *bona fide* buying commission is excludable from dutiable value when the commission is paid directly to the agent. *Rosenthal-Netter, Inc.*, 12 CIT at —, 679 F. Supp. at 23 (citing, *United States v. Nelson Bead Co.*, 42 CCPA 175, 183, C.A.D. 590 (1955); *J.C. Penney*, 80 Cust. Ct. at 95, 451 F. Supp. at 982). By contrast under both statutes selling commissions have been uniformly found to be within the ambit of dutiable value. See, e.g., *Dorf Int'l, Inc.*, 61 Cust. Ct. at 611, 291 F. Supp. at 695; 19 U.S.C. § 1401a(b)(1)(B). Whether a commission is a *bona fide* buying commission depends in each instance on the facts of each particular case. *J.C. Penney*, 80 Cust. Ct. at 95, 451 F. Supp. at 983; *Nelson Bead Co.*, 42 CCPA at 183. One court has noted that the distinction between a buying and a selling commission is "whether the expense is associated with selling or producing the merchandise,

rather than some ministerial function in procuring the goods." *Jay-ARR Slimwear, Inc.* 12 CIT at —, 681 F. Supp. at 878 (citing, *Norco Sales Co. v. United States*, 65 Cust. Ct. 778, 782, R.D. 11732 (1970)).

Plaintiff has the burden of proving both the existence of the principal-agent relationship as well as that the monies paid were, in fact, *bona fide* buying commissions. *Rosenthal-Netter*, 12 CIT at —, 679 F. Supp at 23 (and cases cited therein). "The bedrock upon which the *bona fides* are based is the establishment of the buying agency relationship with respect to the subject transaction." *United States v. Manhattan Novelty Corp.*, 63 Cust. Ct. 699, 702, A.R.D. 263 (1969). The threshold question is the "right of the principal to control the agent's conduct with respect to the matters entrusted to him." *J.C. Penney*, 80 Cust. Ct. at 95, 451 F. Supp. at 983. However, in deciding whether an alleged agency relationship is *bona fide* the Court must examine all relevant factors. *Rosenthal-Netter*, 12 CIT at —, 679 F. Supp at 23.

These factors include: the right of the principal to control the agent's conduct; the transaction documents; whether the importer could have purchased directly from the manufacturers without employing an agent; whether the intermediary was operating an independent business, primarily for its own benefit; and, the existence of a buying agency agreement.

Id. This Court is satisfied that based upon an examination of these factors Moss conclusively established that DMZ was its *bona fide* buying agent.

However, the importer's establishment of the agency relationship with its buying agent does not end the inquiry. In order for the disbursement from the seller to the buyer's agent to be exempt from dutiable value, the importer must additionally show that "none of the commission inures to the benefit of the manufacturer." *J.C. Penney*, 80 Cust. Ct. at 97, 451 F. Supp. at 984; *See also, Manhattan Novelty Corp.*, 63 Cust. Ct. at 702; *Nelson Bead Co.*, 42 CCPA at 183; *United States v. Knit Wits (Wiley)*, 62 Cust. Ct. 1008, 1011, A.R.D. 251 (1969); *Carolina Mfg. Co. v. United States*, 62 Cust. Ct. 850, 854-55, R.D. 11640 (1969); *New Trends Inc. v. United States*, 10 CIT 637, 643, 645 F. Supp. 957, 962 (1986).

CONCLUSION

This Court determines the plaintiff has not overcome the presumption that the appraisal decision of the Customs official and the assessment of duties pursuant to that decision were presumptively correct. For the reasons set forth above, this Court holds where the payment for goods was made to the seller with instructions to disburse part of such funds to the buyer's agent, and where the agent assisted in bringing about the sale, the disbursement constituted monies expended for the benefit of the seller within the meaning of 19 U.S.C. § 1401a(b). The disbursement was properly included as

part of the price paid for the purposes of appraisal valuation establishing the transaction value upon which duties were levied. The Customs appraisal of the merchandise and the assessment of duties thereunder is affirmed. This action is dismissed.

(Slip Op. 89-71)

FORMER EMPLOYEES OF ROCKY MOUNTAIN REGION OFFICE OF TERRA
RESOURCES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 87-09-00923

[Judgment for defendant; action dismissed.]

(Decided May 23, 1989)

Daniel V. Varhus, pro se, on behalf of plaintiff.

John R. Bolton, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Platte B. Moring, III*), for defendant.

OPINION

TSOUICALAS, *Judge*: Daniel V. Varhus, on behalf of the former employees of the Rocky Mountain Region Office of Terra Resources, Inc., contests the Secretary of Labor's denial of certification of eligibility to apply for trade adjustment assistance benefits under the Trade Act of 1974, 19 U.S.C. §§ 2271-2322, 2395 (1982 & Supp. V 1987). Defendant seeks dismissal for lack of jurisdiction because the *pro se* summons and complaint were filed sixty-one days after the Secretary published the notice of his negative determination in the Federal Register, one day beyond the statute of limitation prescribed in 19 U.S.C. § 2395(a). Since defendant's reading of this statute has the support of our appellate court, this Court is compelled to dismiss the present action on the grounds of lack of jurisdiction.

Terra Resources, Inc., headquartered in Tulsa, Oklahoma, engages in the exploration, production, and sale of crude oil and natural gas. Following company-wide layoffs on June 30, 1986, Frank Draney, a representative of Terra Resources, petitioned the Secretary of Labor to obtain certification of eligibility for trade adjustment assistance for thirty-three oil and gas professionals who were discharged from the Rocky Mountain Region Office of Terra Resources. A group of workers whose unemployment is trade-caused may be eligible to apply for adjustment assistance if the Secretary determines, after investigation, that three criteria under 19 U.S.C. § 2272 are met.¹

¹The statute reads:

The Secretary shall certify a group of workers as eligible to apply for adjustment assistance under this part if he determines—

Continued

The Secretary's investigation revealed that Terra Resources' sales and production of oil and gas increased during the pertinent period, thereby failing to meet the second element under 19 U.S.C. § 2272.² Based on this information, the Secretary denied the former employees eligibility to apply for adjustment assistance. The Secretary's negative determination was published on July 9, 1987 in the Federal Register. 52 Fed. Reg. 25,930.

By letter filed September 9, 1987, Daniel V. Varhus, on behalf of the displaced employees, sought review of the Secretary's denial of certification. The Office of the Clerk of the United States Court of International Trade (USCIT) deemed the letter to constitute a summons and complaint. The complaint principally attacks the accuracy of unemployment figures and sales and production data which Terra Resources supplied for the Secretary's consideration. This Court is bound by precedent and concludes that the instant action is time barred because this action expired on September 8, 1987.³

An action challenging the Secretary's final determination under 19 U.S.C. § 2272 must be commenced within sixty days after notice of such determination. 19 U.S.C. § 2395(a). Section 2395(a) does not specify whether the statute of limitation runs from the date of actual or constructive notice. The applicable regulation states that constructive notice, or publication in the Federal Register, is sufficient for purposes of the statutory notice requirement. See 29 C.F.R. § 90.19(a) (1988). In construing these statutory and regulatory provisions, the United States Court of International Trade concluded that with regard to *pro se* petitioners, the statute of limitation does not start to run until the date of receipt of actual notice. See *Kelley v. Secretary, U.S. Dep't of Labor*, 9 CIT 646, 626 F. Supp. 398 (1985) (citations to remand opinions omitted). In fashioning a stricter notice requirement where *pro se* petitioners are involved, *Kelley* recognized that it is onerous to place the burden on those who are not represented by counsel to "constantly search the Federal Register for the final determination of the Secretary of Labor for months beyond the sixty days within which such determination is due under the statute." *Id.* at 648, 626 F. Supp. at 400.

The Court of Appeals for the Federal Circuit reversed *Kelley*, declaring that the sixty-day constructive notice rule applies even to *pro se* petitioners. *Kelley v. Secretary, U.S. Dep't of Labor*, 812 F.2d 1378 (Fed. Cir. 1987). It was adjudged that protecting the sovereign's interests warrants strict construction of statutes of limita-

(1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,

(2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and

(3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

²See the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1421, 102 Stat. 1107, 1242-44 (1988) for an exposition of the third element under 19 U.S.C. § 2272 as it applies to oil and gas workers.

³A straight counting of the days between the date of publication of the negative determination and filing of a summons and complaint on September 9, 1987 yields sixty-two days. However, defendant avers that because September 7, 1987 was Labor Day, the Rules of the USCIT would have permitted a timely filing of the summons and complaint on September 8, 1987. See Rule 6(a) of the Rules of the USCIT.

tion. The ruling was followed in several opinions of the USCIT. See, e.g., *Former Employees of ITT v. Secretary of Labor*, 12 CIT —, slip op. 88-121 (Sept. 12, 1988); *Former Employees of Geosearch, Inc. v. United States*, 11 CIT —, slip op. 87-144 (Dec. 30, 1987).

The weight of precedent demands dismissal of the present action. Dismissal is executed with regret, however, because the law which this Court is entrusted to enforce has an unduly harsh effect on dislocated *pro se* petitioners who may have limited means to become aware of the Secretary's decisions. This Court additionally doubts the extent to which unemployed individuals will have success in mobilizing Congress to change the law which has an onerous effect on them. The adversarial underpinning of our legal system presumes relative equality in access to legal services. Excessive disparity in the litigants' ability to secure legal representation dilutes the strength of our system of law. The *ex parte* nature of the certification process, the remedial purpose of the trade adjustment assistance program, and the Congressional intent under the Trade Act of 1974 to liberalize the availability of adjustment assistance deserve serious judicial inquiry. A law which does not address these considerations in an equitable and judicious manner may contribute to an erosion of confidence in the system. This Court cannot say the governing law in the instant action satisfactorily exhibits concern for this issue.

However, this Court is bound to follow the appellate court's pronouncements. This action is hereby dismissed.

ABSTRACTED CLASSIFICATION D

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				Item No. and rate	Item No. and rate
C89/92	Re, C.J. May 22, 1989	MCF Footwear Corp.	83-2-00196	Item 700.95 or 700.85 12.5%	Item 700.35 8.5% Item 700.45 10%
C89/93	DiCarlo, J. May 22, 1989	Starlight Trading, Inc.	84-4-00487	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates
C89/94	DiCarlo, J. May 22, 1989	Starlight Trading, Inc.	84-6-00770	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates
C89/95	DiCarlo, J. May 22, 1989	Starlight Trading, Inc.	84-6-00773	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates
C89/96	DiCarlo, J. May 22, 1989	Starlight Trading, Inc.	86-3-00381	Item 380.04 or 382.81 Various rates	Item 376.56 Various rates
C89/97	Musgrave, J. May 22, 1989	Sanyo Electric Inc.	88-1-00009	Item 683.70 26.3%	Item 683.80 7.8%

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15	Mitsubishi Int'l Corp. v. U.S., S.O. 87-136 (1987)	New York Footwear
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ates	A.N. Deringer, Inc. v. U.S., C.D. 4218 (1971) and Izod Outerwear v. U.S., 9 CIT 309 (1985); H. Rosenthal v. U.S., C.D. 4769, <i>aff'd</i> , 609 F.2d 999 (1979) and Pacific Trail Sportswear v. U.S., S.O. 88-28 (1988)	New York Men's, women's children's and infants' jackets pants, etc.
ates	A.N. Deringer, Inc. v. U.S., C.D. 4218 (1971) and Izod Outerwear v. U.S., 9 CIT 309 (1985); H. Rosenthal v. U.S., C.D. 4769, <i>aff'd</i> , 609 F.2d 999 (1979) and Pacific Trail Sportswear v. U.S., S.O. 88-28 (1988)	New York Men's, women's children's and infants' jackets pants, etc.
ates	A.N. Deringer, Inc. v. U.S., C.D. 4218 (1971) and Izod Outerwear v. U.S., 9 CIT 309 (1985); H. Rosenthal v. U.S., C.D. 4769, <i>aff'd</i> , 609 F.2d 999 (1979) and Pacific Trail Sportswear v. U.S., S.O. 88-28 (1988)	New York Men's, women's children's and infants' jackets pants, etc.
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